Supreme Court, U.S.
FILED

96 420 SEP 16 1996

OFFICE OF THE CLERK

No. 95-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Stephen E. O'Day, Esq.
Counsel of record
Mark W. Kinzer, Esq.
Michelle R. Craig, Esq.
Smith, Gambrell & Russell
Suite 3100, Promenade II
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
(404) 815-3500
Counsel for Petitioner
Terence D. Hughey

113pp

QUESTIONS PRESENTED

1. Whether § 301 of the Clean Water Act prohibits the discharge of pollutants without a permit.

2. Whether there is an exception to § 301's absolute prohibition against the discharge of pollutants without a permit when, as the Eleventh Circuit held in this case, the following four factors are met: (1) compliance with the no discharge standard is allegedly factually impossible; (2) no permit for the discharge allegedly exists; (3) the discharger allegedly was in good faith compliance with local pollution control requirements that substantially mirrored a proposed NPDES discharge standard; and (4) the discharges allegedly were minimal.

3. Whether the permanent injunction issued against JMS Development Corp. by the district court in this case complies with Fed. R. Civ. P. 65(d).

LIST OF ALL PARTIES

Terence D. Hughey
JMS Development Corp.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

LIST OF ALL PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

RELEVANT STATUTES/REGULATIONS 3

STATEMENT OF THE CASE 3

I. Introduction 3

II. Facts 7

ARGUMENT 12

I. The Eleventh Circuit Opinion Conflicts with Prior Decisions of this Court 12

II. The Eleventh Circuit's Opinion Conflicts with Decisions of Other United States Courts of Appeals on the Same Matter 16

III. The Eleventh Circuit's Alternative Holding Should Also Be Reviewed by this Court. 20

CONCLUSION 21

APPENDIX

1. Relevant Statutes/Regulations Relied Upon 1-A

2. Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), *reh'g denied,* 89 F.3d 857 (11th Cir. June 17, 1996 . . . . . 4-A

3. Hughey v. JMS Development Corp., 89 F.2d 857 (11th Cir. June 17, 1996) - Denial of Rehearing 29-A

4. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. August 31, 1992) 31-A

5. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. September 11, 1992) 33-A

6. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. November 9, 1992) 34-A

7. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. March 29, 1993) 61-A

8. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. December 15, 1993) 80-A

9. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994) 102-A

10. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. May 19, 1994) 115-A

11. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. June 24, 1994) 125-A

12 Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. July 7, 1994) 127-A

13. *City Investigating Cause of River Fire*, THE PLAIN DEALER, June 24, 1969 ..... 129-A

14. Motion of the Environmental Protection Division, Georgia Department of Natural Resources to File a Brief as Amicus Curiae (relevant portion only) 131-A

15. EPA RELEASES FINAL STORMWATER DISCHARGE PERMIT, ENVIRONMENTAL NEWS, September 3, 1992 ..... 133-A

16. 55 Fed. Reg. 97790 (1990) 135-A

17. 60 Fed. Reg. 62546 (1995) 136-A

18. 60 Fed. Reg. 53529 (1995) 137-A

19. 61 Fed. Reg. 7730 (1996) 138-A

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer, 470 U.S. 564, 576-78, 105 S. Ct. 1504, 1512-13 (1985) 7

Arkansas v. Oklahoma, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (1992) 11, 12, 17

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S. Ct. 1102, 1107 ..... 15, 16, 17

Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-945, 104 S. Ct. 2778, 2781-2783 (1984) 15, 16

City of Burlington v. Dague, 112 S. Ct. 2638 (1992) 17

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 311, 101 S. Ct. 1784, 1789 (1981) 12, 14, 16

Combs v. Ryan's Coal Co., 785 F.2d 970, 978 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187 (1986) 20, 21

Commonwealth of Massachusetts v. United States Veterans Administration, 541 F.2d 119, 121 (lst Cir. 1976) 5

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) 2, 6, 17

E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977) 12, 16

EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976) 12, 13, 16

EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) 12, 14, 16

Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) 5

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) 5, 13, 17

Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga November 9, 1992). 1, 9

Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. December 15, 1993) 1, 14

Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994) 1, 7, 14

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. April 1, 1996),

reh'g denied, 89 F.3d 857 (11th Cir. June 17, 1996) 1, 2, 4, 14, 21

International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) 13, 17

Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951 (1991) 21

Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir 1983) 2, 6, 17

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) 12, 13, 16

National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 435-438, 61 S. Ct. 693, 699-701 (1941) .. 20

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 2, 6, 17

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977) 2, 6, 17

PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994) 17

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,73F.3d 546 (5th Cir. 1996), *petition for cert. filed*,

64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831) 2, 5, 17, 18, 19, 20

Steelcase, Inc. v. Delwood Furniture Co., 578 F.2d 74, 78 (5th Cir. 1978), *cert. denied*, 440 U.S. 960, 99 S. Ct. 1503 (1979) 7

U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985) 21

United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980) 2, 6, 17

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S. Ct. 455, 461 (1985) 15, 16

U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992) 17

Weinberger v. Romero-Barcelo, 465 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982) 2, 13, 14, 15, 17

Statutes

28 U.S.C. § 1254(1) 2

33 U.S.C. § 1251 et seq. 3, 4

33 U.S.C. § 1251(a) 3, 13, 16

33 U.S.C. § 1251(a)(1)(2) 21

33 U.S.C. § 1311 ..... *passim*

33 U.S.C. § 1311(a) 3, 12, 19

33 U.S.C. § 1342 ..... 7, 8, 18

33 U.S.C. § 1342(a) 3

33 U.S.C. § 1342(b) 3, 11

33 U.S.C. § 1342(k) 3, 19

33 U.S.C. § 1362(6) 3, 9

33 U.S.C. § 1362(14) 3, 9

33 U.S.C. § 1365 ..... 3, 5, 19

33 U.S.C. § 1365(a) 7

33 U.S.C. § 1365(f)(1) 19

O.C.G.A. § 12-5-30(a) 3, 14

O.C.G.A. § 12-7-6(18) (1992) 10

Regulations

33 C.F.R. § 328.3(a) 3, 9

55 Fed. Reg. 47990, 47990 (1990) 15

60 Fed. Reg. 53529, 53529 (1995) 15

60 Fed. Reg. 62546, 62547 (1995) 15

61 Fed. Reg. 1730, 1731 (1996) 15

Rules

Federal:

Fed. R. Civ. P. 65(d) ..... ii, 20

Sup. Ct. R. 10(c) 6, 16

State:

DNR Rule 391-3-6-.15 ..... 3, 14

Legislative History

118 Cong. Rec 36871 and 37054 (1972) 3

S. REP. NO. 414, 92ND CONG., 1ST SESS. 81 (1971) 19

S. REP. NO. 414, 92ND CONG., 2ND SESS. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 5

Miscellaneous

City Investigating Cause of River Fire, THE PLAIN DEALER, June 24, 1969 3

EPA RELEASES FINAL STORMWATER DISCHARGE GENERAL PERMIT, "EPA's Environmental News" (September 3, 1992) 10

No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") is reported at 78 F.3d 1523 (11th Cir. 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), and is reprinted in the Appendix at p. 4-A. The orders of the United States District Court for the Northern District of Georgia in this case, No. 1:92-CV-2051-RHH, are

unreported. The relevant opinions of the District Court are reprinted in the Appendix at pp. 31-A through 127-A.

STATEMENT OF JURISDICTION

The Court has jurisdiction in this case, pursuant to 28 U.S.C. § 1254(1), to review by writ of certiorari the final decision of the United States Court of Appeals for the Eleventh Circuit in Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. April 1, 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), which conflicts with the decision of this Court in Weinberger v. Romero-Barcelo, 465 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982), and directly conflicts with the following decisions of other Circuit Courts: Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831); National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-28 (3rd Cir. 1979)), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980); Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983), and which presents issues of national importance.

RELEVANT STATUTES/REGULATIONS[1]

Petitioner relies primarily on the following statutes and regulations: 33 U.S.C. § 1251(a); 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(a); 33 U.S.C. § 1342(b); 33 U.S.C. § 1342(k); 33 U.S.C. § 1362(6); 33 U.S.C. § 1362(14); 33 U.S.C. § 1365; 33 C.F.R. § 328.3(a); O.C.G.A. § 12-5-30(a); DNR Rule 391-3-6-.15.

STATEMENT OF THE CASE

I. Introduction

In 1972, Congress reacted to water pollution so severe that the Cuyahoga River in Cleveland, Ohio actually caught fire,[2] and passed the Federal Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251, et seq. (the "Clean Water Act", "CWA" or the "Act"). The CWA passed Congress overwhelmingly[3] and became law on October 18, 1972. In language as mandatory and absolute as any Congress has ever enacted, Congress sought to control continued pollution of the country's rivers, streams and lakes, by stating: "except as in compliance with [specified sections of the Act], the discharge

---

[1]The relevant text for these citations is contained in the Appendix at p. 1-A.

[2]*City Investigating Cause of River Fire*, THE PLAIN DEALER, June 24, 1969. (Reprinted in Appendix at p. 129-A).

[3]The Senate approved the amendments, 52 yeas to 12 nays and the House approved the amendments, 247 yeas to 23 nays. 118 Cong. Rec 36871 and 37054 (1972).

of any pollutant by any person is illegal." 33 U.S.C. § 1311. Congress' absolute prohibition has remained unchanged and intact through several amendments to the Clean Water Act, and until the Eleventh Circuit's opinion[4] in this case, has been fully supported by strong language from this Court, and other federal courts that have interpreted the law since 1972. Now, for the first time, contrary to express language in this Court's opinions, and in direct conflict with rulings from other Circuit Courts of Appeal, the Eleventh Circuit, Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996), ("JMS"), has created a judicial exception to Congress' absolute prohibition, an exception which is unsupported by any language in the Clean Water Act, and which finds no support in the legislative history of the Act. Petitioner seeks a writ of certiorari from this Court to correct the travesty of justice thus visited by the Eleventh Circuit upon the citizens and waters of this country.[5]

The Eleventh Circuit's judicial exception to Congress' absolute prohibition of the discharge of pollutants into waters of the United States without a permit allows the continuation of pollution which the U.S. Environmental Protection Agency ("EPA") has called "the leading [and the] largest remaining, virtually unaddressed source of water pollution" in the country, (R3-26-7), "causing an estimated one-third of impaired water

---

[4]The Eleventh Circuit's opinion in this case was written by U.S. District Court Judge Wilbur Owens, sitting by designation.

[5]The case originated in the United States District Court for the Northern District of Georgia. The district court had federal question jurisdiction over the case to review Mr. Hughey's claims under the federal Clean Water Act, 33 U.S.C. § 1251 et seq.

quality nationwide" (R2-19-18), when "slumbering [state] agencies" like the State of Georgia in this case fail or refuse to enforce the law's requirements. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) (citizen suits are designed for when federal, state or local agencies fail to exercise enforcement authority); Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) (the purpose of the citizen's liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction); S. REP. NO. 414, 92ND CONG., 2ND SESS. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (citizens perform a public service by bringing citizen suits under the CWA). In doing so, the Eleventh Circuit nullified another crucial provision of the Clean Water Act, the citizens suit provision contained in 33 U.S.C. § 1365, which the courts have acknowledged was established by Congress to supplement the enforcement of the Act by federal and state agencies. Gwaltney, 484 U.S. at 60, 108 S. Ct. at 383 (a citizen suit is meant to supplement governmental action); Commonwealth of Massachusetts v. United States Veterans Administration, 541 F.2d 119, 121 (lst Cir. 1976) (the Clean Water Act's citizen suit provision was designed to supplement and expedite administrative action to abate violations of the Act).

Because the opinion written by Judge Owens is contrary to express language contained in this Court's opinion, because the opinion directly conflicts with the opinion of the Fifth Circuit Court of Appeals in Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831) and previous holdings of the District of Columbia,

Second, Third and Fourth Circuit Courts of Appeals,[6] and because the opinion judicially creates a gaping hole in the foundation of Congress' structure for controlling pollution of this country's waters, and allows massive pollution of the waters to continue unchecked, Petitioner submits that, in satisfaction of all this Court's factors for the issuance of a writ of certiorari, Sup. Ct. R. 10, this case begs for the Court's attention.

In reaching its opinion, the Eleventh Circuit ignored, without reversing, crucial holdings by the trial court which state a clearer picture of the facts than is contained in the

---

[6]National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (the discharge of any pollutant by any person without a permit is unlawful); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977) (Congress intended the NPDES permit to be the only means by which a point source may escape the total prohibition of § 301 of the Act); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) (the Act provides that absent a permit, the discharge of any pollutant by any person shall be unlawful); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-28 (3rd Cir. 1979)), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980) (the Act flatly prohibits any discharge of pollutants even where EPA has failed to promulgate applicable effluent limitations, and the discharger has not applied for a permit; Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983) (the Act forbids any pollutant discharge into waters of the U.S. except in accordance with a valid NPDES permit).

Eleventh Circuit opinion.[7] A brief rendering of those facts therefore is necessary here.

II. Facts.

On August 28, 1992, Petitioner Terence D. Hughey ("Hughey") began this litigation in the United States District Court for the Northern District of Georgia by filing a complaint against JMS Development Corporation ("JMS") seeking injunctive relief, civil penalties and attorneys' fees, pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a). For a period of at least six months prior to that date, and continuing thereafter, JMS knowingly discharged polluted water from its residential subdivision development in Gwinnett County, Georgia without a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, in direct violation of Section 301 of the CWA, 33 U.S.C. § 1311. Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994), pp. 9-12, (R6-58-9-12) (reprinted in Appendix at p. 102-A); R11-6-8, 79-85; R12-15-23; P. Exh. 25, 29, 31 (photos, videotape and sample results). Appellant's discharges exceeded limits established in state and local law by more than 2,000 times those limits. R3-26-3; P. Exh. 28, 31 (sample results). JMS' polluted discharges converted a

---

[7]The Eleventh Circuit did not find any of the district court's factual findings "clearly erroneous" and, therefore, those factual decisions still stand and are still controlling. See Anderson v. City of Bessemer, 470 U.S. 564, 576-78, 105 S. Ct. 1504, 1512-13 (1985) (a reviewing court is bound by the lower court's factual findings, unless those findings are found to be clearly erroneous); Steelcase, Inc. v. Delwood Furniture Co., 578 F.2d 74, 78 (5th Cir. 1978) (a trial court's factual findings are controlling unless clearly erroneous), *cert. denied*, 440 U.S. 960, 99 S. Ct. 1503 (1979).

formerly clear running stream containing organic material and stream life into a dead stream covered by six to nine inches of sediment. R3-26-27; R9-9-10; R11-6-8, 79 to 85; P. Exh. 9 through 24, 29 (photographs). The discharges polluted and choked downstream wetlands, and polluted the Yellow River, into which the stream flowed. Id. The polluted water thereafter flowed through Mr. Hughey's property.

On August 31, 1992, after a hearing at which both parties were represented, the district court entered a temporary restraining order prohibiting further discharges. On October 16, 1992, the court held an evidentiary hearing on Hughey's motion for contempt of the TRO, and on JMS' motion to dissolve the TRO. R8 through R11. On November 4, 1992, the court held an evidentiary hearing on Hughey's motion for preliminary injunction. R11. On November 9, 1992, the district court denied JMS' motions and granted a preliminary injunction, prohibiting further discharges of pollutants into waters of the U.S. without a National Pollutant Discharge Elimination System ("NPDES") permit.[8] R3-26.

After an additional evidentiary hearing on standing, the district court entered final judgment on February 24, 1994 finding that JMS had violated the CWA on seventeen (17) separate occasions by discharging polluted stormwater through point sources constructed by JMS into the waters of the United States without a permit. R6-58-10. The district court assessed civil penalties in the amount of $8,500.00, and ordered JMS to reimburse Hughey for his costs of litigation and attorneys' fees.

---

[8]NPDES permits are authorized by § 402 of the CWA, 33 U.S.C. § 1342.

R6-58. The court also entered a permanent injunction prohibiting JMS from discharging "stormwater"[9] into waters of the United States if such discharges would be in violation of the Act. R6-58-14. In a later order, the district court awarded Hughey his attorneys' fees and expenses of litigation. R7-72.

It was undisputed in the district court that soil and sediment from JMS' construction activities constituted "pollutants" within the meaning of the CWA, 33 U.S.C. § 1362(6). It was also undisputed that JMS constructed and operated the pipes through which stormwater containing those pollutants was discharged from the residential development, and that those pipes were "point sources" within the meaning of the CWA, 33 U.S.C. § 1362(14). It was also undisputed that the pollutants were discharged into "waters of the United States", within the meaning of 33 C.F.R. § 328.3(a).

In seeking and obtaining the permanent injunction and penalties assessed by the district court on the basis of such undisputed facts, Mr. Hughey epitomized the private attorney general envisioned by Congress when it enacted the citizen suit provision of the Act. Having noticed in his daily walks through his subdivision that JMS' new development was discharging massive quantities of silt and sediment into a stream, which in turn fed the Yellow River above Mr. Hughey's home, R12-21, 102-103; P. Exh. 9 through 25, 29, 36 (photographs and videotape), Mr. Hughey documented the

---

[9]The district court defined "stormwater" as "water that contains sedimentation from land disturbing activities." Hughey v. JMS Development Corp., No. 1:92-cv-2051-RHH (N.D. Ga. November 9, 1992) (R3-27-3) (reprinted in Appendix at p. 34-A).

polluted discharges in videotapes and photographs submitted to the district court. P. Exh. 25, 36 (videotapes); R12-20-24. He also sampled the discharges, documenting levels of pollution over 2,000 times the level allowed under state law. P. Exh. 31 (sample results); R9-29-32; R11-8-13, 15-29, 77-97; see O.C.G.A. § 12-7-6(18) (1992) (setting a limit on turbidity of discharges from construction activities of 50 nephelometric turbidity units ("NTUs") above the level of the receiving stream). He also retained an expert to investigate the pollution and analyze its impact on the stream. The expert, a professor of hydrology and soil science at the University of Georgia, testified that the pollution literally smothered the streambed, and caused polluted water to flow from the subdivision all the way into the Yellow River. R9-9-10.

Mr. Hughey thus sought to address, in a citizen suit filed under the CWA, pollution which the EPA has declared to be "the leading [and the] largest remaining, virtually unaddressed source of water pollution" in the country, EPA RELEASES FINAL STORMWATER DISCHARGE GENERAL PERMIT in "EPA's Environmental News" (September 3, 1992) (R2-19-18) (relevant portions reprinted in Appendix at p. 133-A), which causes "an estimated one-third of impaired water quality nationwide," Environmental Protection Division, Brief as *Amicus Curiae*, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D.Ga. 1992) (R2-19-18) (reprinted in Appendix at 131-A). The State of Georgia Environmental Protection Division also has recognized that runoff from construction sites is now a significant cause of water quality degradation. Id. at 10.

Contributing to the nationwide trend of uncontrolled discharges of water pollution from construction sites, JMS neither sought nor obtained a permit for its discharges until after the district court entered a temporary restraining order. Although its discharges continued after the TRO was entered, JMS never obtained a permit for the discharges. Finding that the State of Georgia Environmental Protection Division ("EPD"), which had been delegated permit issuing authority pursuant to the CWA, 33 U.S.C. § 1342(b), had not made such a permit available, and ignoring the absolute prohibition under the CWA against discharges of pollutants without a permit, 33 U.S.C. § 1311, the Eleventh Circuit Court of Appeals, in an "interpretation of the statute [which] had not been advanced by any party during the [appeal]", Arkansas v. Oklahoma, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (1992), "made a policy choice that it was not authorized to make", Id. at 113, 112 S. Ct. at 1061, and reversed the district court. In order to do so, the Eleventh Circuit created a new exception to § 301 under which any person may discharge pollutants into waters of the United States without a permit if: (1) compliance with the no discharge standard is factually impossible; (2) no permit for the discharge exists; (3) the discharger was in good faith compliance with local pollution control requirements that substantially mirrored a proposed NPDES discharge standard; and (4) the discharges were minimal. For the reasons set forth hereinafter, Petitioner urges the Court to issue a writ of certiorari to review the Eleventh Circuit's opinion, and to reverse the judgment of the Eleventh Circuit, and reinstate the district court's judgment.

ARGUMENT

I. The Eleventh Circuit Opinion Conflicts with Prior Decisions of this Court.

In the almost 25-year history of its interpretations of the CWA, this Court has consistently and unequivocally stated that § 301(a) of the CWA, 33 U.S.C. § 1311, absolutely prohibits discharges of pollutants into waters of the United States unless a permit authorizes such discharges. As Chief Justice Rehnquist stated in one of the earliest cases, the CWA "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 311, 101 S. Ct. 1784, 1789 (1981) ("City of Milwaukee"). Most recently, this Court unanimously reaffirmed that discharges of pollutants without a permit are absolutely prohibited: "[s]ection 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit." Arkansas, 503 U.S. at 102, 112 S. Ct. at 1054. In between, this Court has mirrored in its opinions the absolute language of § 301, stating on numerous occasions that "under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976) (State Water Resources Control Board); see also E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977) ("duPont"); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) ("National Crushed Stone"); Middlesex County

Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) ("National Sea Clammers"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982) ("Romero-Barcelo"); International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) ("Ouellette"); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53, 108 S. Ct. 376, 379 (1987) ("Gwaltney").

Ignoring these statements, the Eleventh Circuit has smashed a gaping hole in the prohibition of discharges without a permit, which this Court has acknowledged as the foundation of Congress' effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[10] 33 U.S.C. § 1251(a). See State Water Resources Control Board, 426 U.S. at 205, 96 S. Ct. at 2025 (the NPDES permit program was one of the major changes to the CWA in the 1972 amendments); National Sea Clammers, 453 U.S. at 11, 101 S. Ct. at 2622 (the 1972 amendments shifted the emphasis of the CWA to direct restrictions of discharges); Romero-Barcelo, 456 U.S. at 319, 102 S. Ct. at 1807 (the permit system is the key to accomplishing the purpose of the CWA--the elimination of water pollution); Ouellette, 479 U.S. at 489, 107 S. Ct. at 810 (the NPDES permit system is one of the primary features

---

[10]The four factors articulated by the Eleventh Circuit as considerations for determining CWA liability are appropriate only in the penalty phase, and in fact were taken into account by the district court in reducing the penalty award against JMS to $8,500. (R6-58). The Eleventh Circuit has subverted Congress's careful scheme of establishing absolute liability for the discharge of pollutants without a permit, while allowing special mitigating circumstances (such as those illustrated by the four factors) to reduce the civil penalty imposed against the discharger.

of the 1972 Amendments to the CWA). In creating an exception which contradicts numerous opinions of this Court, and which "[t]he plain language of the statute does not support", National Crushed Stone, 449 U.S. 64, 73, 101 S. Ct. 295, 302, the Eleventh Circuit reacted to what it perceived to be an injustice created by the asserted unavailability of a permit for JMS' discharges, coupled with what it perceived to be the minimal level of those discharges.[11] Making a judgment that the law as enacted by Congress would "compel an odd result," JMS, 78 F.3d at 1523, the Eleventh Circuit substituted its own judgment for that of Congress. However, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." City of Milwaukee, 451 U.S. 304, 305, 101 S. Ct. 1784, 1786. In doing so, the Eleventh Circuit also ignored this Court's holding in Romero-

---

[11]As stated above, the Eleventh Circuit's perception of the case directly contravened the facts as found by the district court from undisputed evidence in the case: (1) that prevention of the discharges was possible and in fact easy enough to allow reduction of the assessed penalty due to the district court's finding that JMS did not gain economic benefit from failing to install the necessary pollution control mechanisms, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. February 24, 1994), p. 12 (R6-58-12) (reprinted in Appendix at p. 102-A); and (2) that JMS violated state effluent limitations on the 17 occasions on which it discharged pollutants without a permit, Hughey v. JMS Development Corp., No. 1:92-CV-2051-RHH (N.D. Ga. December 15, 1993), pp. 9-10, 13, 15, 22, 27 (R6-52-9-10, 13, 15, 22, 27) (reprinted in Appendix at p. 80-A). The Eleventh Circuit also ignored EPA-approved state regulations which provided for the availability of a permit covering JMS' discharges of stormwater containing soil and sediment from JMS' construction activities, which JMS did not even attempt to obtain. O.C.G.A. § 12-5-30(a); DNR Rule 391-3-6-.15. Finally, the Eleventh Circuit ignored undisputed facts in the record that JMS' discharges had smothered the life of the receiving stream, R9-9-10, and therefore were not "minimal."

Barcelo, which should have compelled affirmance of the district court's order.

In Romero-Barcelo, this Court affirmed a district court order finding that discharges of ordnance by the United States Navy through accidental bombings of navigable waters, without a permit, were unlawful under § 301(a) of the CWA. This Court affirmed the district court's holding that such discharges were unlawful, even though EPA had not made a permit available for such discharges, and even though the discharges were minimal and "have not harmed the quality of the water." Romero-Barcelo, 456 U.S. at 307, 102 S. Ct. at 1801. Those holdings were affirmed by this Court without discussion, on its way to ruling that the district court properly exercised its equitable discretion in failing to enjoin the discharges, and instead ordering the Navy to obtain a permit from EPA for its discharges.

The Eleventh Circuit's opinion below therefore contradicts not only numerous statements in this Court's opinions that the CWA prohibits all discharges of pollutants into waters of the United States without a permit, but also directly contradicts this Court's affirmance of the district court order in Romero-Barcelo, that even minimal, nonharmful discharges of pollutants into waters of the U.S. are illegal without a permit, even though permits for such discharges have not been made available by EPA.[12] Because the Eleventh Circuit's opinion

---

[12]The Eleventh Circuit's opinion also conflicts with the Court's finding that an agency's interpretation of a statute is entitled to deference. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S. Ct. 455, 461 (1985); Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S. Ct. 1102, 1107; Chevron U.S.A.,

"has decided an important federal question in a way that conflicts with relevant decisions of this Court", Sup. Ct. R. 10(c), this Court should grant certiorari and reverse the Eleventh Circuit.

II. The Eleventh Circuit's Opinion Conflicts with Decisions of Other United States Courts of Appeals on the Same Matter.

It cannot be argued that the "chemical, physical, and biological integrity of the Nation's waters", 33 U.S.C. § 1251(a), is a matter of utmost national importance. This Court has acknowledged the importance of a correct interpretation of the CWA by granting certiorari on at least fourteen (14) separate occasions in the last 20 years to correct erroneous interpretations of the CWA.[13] This Court has not hesitated to

---

Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-945, 104 S. Ct. 2778, 2781-2783 (1984). The EPA consistently interprets § 301 of the CWA as an absolute prohibition against the discharge of pollutants into waters of the U.S. without a permit. See 55 Fed. Reg. 47990, 47990 (1990); 60 Fed. Reg. 53529, 53529 (1995); 60 Fed. Reg. 62546, 62547 (1995); 61 Fed. Reg. 1730, 1731 (1996) (reprinted in Appendix at pp. 135-A through 138-A). The Eleventh Circuit's opinion, creating an exception to the absolute language of § 301, further conflicts with the precedent of this Court because it fails to give deference to the EPA's interpretation of § 301. Riverside Bayview Homes, 474 U.S. at 131, 106 S. Ct. at 46; Chemical Manufacturers, 470 U.S. at 125, 105 S. Ct. at 1107; Chevron, 467 U.S. at 842-845, 104 S. Ct. at 2781-2783.

[13]EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 96 S. Ct. 2022 (1976); DuPont, 430 U.S. 112, 97 S. Ct. 965 (1977); National Crushed Stone, 449 U.S. 64, 101 S. Ct. 295 (1980); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304,101 S. Ct. 1784 (1981); National Sea Clammers Assoc.,453 U.S. 1, 101 S. Ct. 2615 (1981);

grant certiorari to resolve conflicts among the Circuit Courts of Appeal on interpretations of the CWA.

The Eleventh Circuit opinion in this case directly contradicts, without even citing, the holding of the United States Court of Appeals for the Fifth Circuit in Cedar Point Oil Co., 73 F.3d at 561, and holdings of the District of Columbia (National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977)), Second (Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995)), Third (United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980)), and Fourth (Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983)), Circuit Courts of Appeal. The cited cases from the District of Columbia, Second, Third and Fourth Circuits all follow the above quoted statements from this Court's opinions, and hold, *e.g.*, that Congress intended the NPDES permit to be the only means by which a point source may escape the total prohibition against discharges of pollution under § 301(a) of the CWA. Costle,

---

Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798 (1982); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985); Chemical Manufacturer's Assoc. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102 (1985); Ouellette, 479 U.S. 481, 107 S. Ct. 805 (1987); Gwaltney, 484 U.S. 49, 108 S. Ct. 376 (1987); U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992); City of Burlington v. Dague, 112 S. Ct. 2638 (1992); Arkansas v. Oklahoma, 503 U.S. 91, 112 S. Ct. 1046 (1992); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994).

supra. The Eleventh Circuit's creation of an exception to that absolute prohibition contradicts those holdings.

The Eleventh Circuit decision most directly conflicts with the recent decision of the Fifth Circuit in Cedar Point Oil. In that case, the plaintiff filed a citizen suit alleging that Cedar Point Oil "was violating the CWA by discharging produced water into Galveston Bay without a permit ... ." Cedar Point Oil, 73 F.3d at 550. Like the defendant in this case, Cedar Point Oil argued that the Sierra Club had "failed to state a claim with respect to the discharges ... because EPA has not established an applicable effluent limitation or permit for those discharges." Id. at 559. Rejecting the contention adopted by the Eleventh Circuit in this case, the Fifth Circuit held that "a citizen may bring an action against a person allegedly discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit." Id. at 561. Without citing or mentioning the Cedar Point Oil decision, the Eleventh Circuit reached a directly contrary result in this case, holding that the failure by the Georgia EPD (which had been delegated permit issuing authority from the EPA pursuant to 33 U.S.C. § 1342) to make a permit available, justified JMS' discharges in this case, and, together with the other factors established by the Eleventh Circuit, made those discharges lawful.

The Fifth Circuit's decision in Cedar Point Oil was based on a careful review of the language utilized by Congress in the CWA, and the legislative history of the CWA. For example, the Fifth Circuit noted that when Congress initially passed the CWA in 1972, Congress recognized that there would be a time period during which dischargers would be discharging

pollutants without a permit because a permit was not yet available under the Act. Congress protected such dischargers from citizen suits for a specified time period, by providing that 33 U.S.C. § 1365 did not allow a citizen to bring an action against a person allegedly committing an unlawful act under § 301(a), 33 U.S.C. § 1311(a), (discharging without a permit) until July 1, 1973. 33 U.S.C. § 1365(f)(1). The legislative history states that Congress delayed the availability of a citizen suit based on an unlawful act under § 301(a) in order to give EPA and states time to issue all the permits required by the CWA. S. REP. NO. 414, 92ND CONG., 1ST SESS. (1971).

The Fifth Circuit also noted that EPA and the states have yet to achieve the goal of making all of the necessary permits available under the CWA. "Nevertheless, Congress has not amended the statute to account for the fact that, since July 1, 1973, numerous entities have violated § 1311(a) by discharging pollutants without a permit because EPA and the states have not issued the necessary permits." Cedar Point Oil, 73 F.3d at 560.

Congress provided a similar temporary reprieve in 33 U.S.C. § 1342(k), under which until December 31, 1974, discharges without a permit for which an application had been filed but the permit not issued, would not violate § 301. Again, the legislative history indicated that the provision was intended to provide a "liability shield" to dischargers for a limited time. Id. (citing *A Legislative History of the Water Pollution Control Act Amendments of 1972*, p. 274 (Environmental Policy Div., Congressional Research Serv. ed. 1973)). Again, "Congress has not extended the availability of this liability shield beyond its original expiration date, despite the fact that application for

permits are continually filed and many remain pending." Cedar Point Oil, 73 F.3d at 560.

The Eleventh Circuit's decision in this case directly conflicts with the Fifth Circuit's opinion in Cedar Point Oil. Because § 301(a) has previously been found by this Court to be the cornerstone of the CWA, the gaping hole created by the Eleventh Circuit in that cornerstone is an important matter of federal law. Petitioner therefore urges this Court to grant a writ of certiorari to review the Eleventh Circuit's erroneous interpretation of the CWA, and reverse its judgment.

III. The Eleventh Circuit's Alternative Holding Should Also Be Reviewed by this Court.

In an alternative ruling, the Eleventh Circuit also reversed the district court's injunction as invalid under Fed. R. Civ. P. 65(d), because it was not sufficiently specific. In successive rulings in the TRO, the preliminary injunction and the permanent injunction, the district court prohibited JMS from discharging any pollutants into the waters of the United States without a permit. The permanent injunction prohibited JMS from discharging polluted stormwater into waters of the United States if such discharges would be in violation of the CWA. Having held that it was the failure to have a permit for such discharges that caused the discharges to be in violation of the CWA, the district court had made it clear that JMS could comply with the injunction either by ceasing its discharges, or obtaining a permit for those discharges. JMS could clearly understand its obligations under the injunction. Combs v. Ryan's Coal Co., 785 F.2d 970, 978 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187 (1986). See also National

Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 435-438, 61 S. Ct. 693, 699-701 (1941). The Eleventh Circuit apparently wanted the district court to go further and mandatorily enjoin JMS to take specific acts. JMS, 78 F.3d at 1531. However, it is JMS's duty under the Act to take the necessary steps to cease its discharges of pollution, not the court's duty to tell it how to do so.

In any event, an injunction failing to meet Rule 65(d)'s specificity requirement should not necessarily be voided. Combs, 785 F.2d at 978. Instead, the Eleventh Circuit should have remanded the case to the district court to revise the wording of the injunction, or should have corrected the injunction. Id. See also Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951 (1991); U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985). This Court should review the Eleventh Circuit's alternative reason for reversing the district court, and remand the case to the Eleventh Circuit for proceedings not inconsistent with this Court's rulings.

CONCLUSION

The Eleventh Circuit's decision is nothing short of revolutionary. It disregards clear statutory language and substitutes its own judgment for that of Congress. It ignores opinions from this Court, and from all other Circuit Courts of Appeal which have addressed the issue, all of which have found § 301(a) of the CWA to be an absolute prohibition of any discharge of any pollutants into any waters of the United States without a permit. This extreme example of judicial activism by the Eleventh Circuit in contravention of this Court's opinions

should be reviewed by this Court in order to ensure the continued integrity of the water pollution control program enacted by Congress in 1972 and enforced by all courts which have interpreted it ever since. Even limited to its facts, the panel decision contravenes the express purpose of the Act to eliminate the discharge of pollutants into the waters of the U.S. in order to make the waters safe for wildlife and recreation. 33 U.S.C. § 1251(a)(1)(2). Petitioner urges this Court to grant a writ of certiorari in order to restore the law to the state previously recognized by this Court: that there shall be no discharge of water pollution into U.S. waters except in compliance with a CWA permit.

Respectfully submitted,

Stephen E. O'Day
Counsel of Record
Mark W. Kinzer
Michelle R. Craig
Smith, Gambrell & Russell
Suite 3100, Promenade II
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
(404/815-3500 - Telephone)
(404/815-3509 - Facsimile)

Counsel for Petitioner

No. 95-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

RELEVANT STATUTES/REGULATIONS RELIED UPON[1]

1. **33 U.S.C. § 1251(a)** -- "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

2. **33 U.S.C. § 1311(a)** -- "Except as in compliance with this section and sections ... 1342 ... of this Title, the discharge of any pollutant by any person shall be unlawful."

3. **33 U.S.C. § 1342(a)** -- "Except as provided in sections 1328 and 1344 of this Title, the administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this Title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this Title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the administrator determines are necessary to carry out the provisions of this chapter."

4. **33 U.S.C. § 1342(d)** -- "At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this Title, the governor of each state desiring to administer its own permit program for discharges into navigable waters within its jurisdiction

---

[1] Only relevant portions included.

may submit to the administrator a full and complete description of the program it proposes to establish and administer under state law or under an interstate compact ... . The administrator shall approve each such submitted program unless he determines that adequate authority does not exist ..."

5. **33 U.S.C. § 1342(k)** -- "Compliance with a permit issued pursuant to this section shall be deemed compliance, ..., with section 1311, ... of this Title, ..."

6. **33 U.S.C. § 1362(6)** -- "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."

7. **33 U.S.C. § 1362(14)** -- "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged."

8. **33 C.F.R. § 328.3(a)** -- "(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including

interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudslides, sandslides, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce ..."

9. **O.C.G.A. § 12-5-30(a)** -- "Any person who owns or operates a facility of any type or who desires to erect, modify, alter, or commence operation of a facility of any type which results or will result in the discharge of pollutants from a point source into the waters of the state shall obtain from the director a permit to make such discharge."

10 **DNR Rule 391-3-6-.15(a)2** -- "General Permit Requirements" -- "The director may issue a general permit . . ."

11. **DNR Rule 391-3-6-.15(b)2** -- "Requiring an Individual Permit" -- "The director may require any person authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the director to take action under this paragraph."

12. **DNR Rule 391-3-6-.15(c)** -- .... "All discharges into a storm water point source must either be covered by an individual permit or a permit issued to the owner or operator of that portion of the system that directly discharges into waters of the state."

TERENCE D. HUGHEY,
Plaintiff-Appellee,

v.

JMS DEVELOPMENT CORPORATION,
Defendant-Appellant.

TERENCE D. HUGHEY,
Plaintiff-Appellee,
Cross-Appellant,

v.

JMS DEVELOPMENT CORPORATION,
Defendant-Appellant,
Cross-Appellee.

Nos. 94-8402, 8855

United States Court of Appeals
Eleventh Circuit

[78 F.3d 1523]

April 1, 1996.

Landowner filed citizens suit under Clean Water Act (CWA) seeking to enjoin developer from discharging storm water run-off. The United States District Court for the Northern District of Georgia, No. 1:92-CV-2051-RHH, Robert H. Hall, Jr., issued permanent injunction, imposed fine, and

awarded landowner attorney fees and costs. Appeal was taken. The Court of Appeals, Owens, District Judge, sitting by designation, held that: (1) CWA's zero discharge standard for storm water runoff from construction activities in absence of National Pollutant Discharge Elimination System (NPDES) permit did not apply to developer when compliance was factually impossible, and (2) injunction prohibiting developer from discharging any storm water runoff was unenforceable "obey the law" injunction in absence of operative command capable of enforcement.

Orders vacated and injunction dissolved.

Carnes, Circuit Judge, filed opinion concurring in part.

Appeals from the United States District Court for the Northern District of Georgia.

Before ANDERSON and CARNES, Circuit Judges, and OWENS*, District Judge.

OWENS, District Judge:

I. INTRODUCTION

Appellant JMS Development Corporation ("JMS") is the developer of a 19.2-acre residential subdivision in Gwinnett County, Georgia. Appellee Terence D. Hughey ("Hughey") is a Gwinnett County homeowner admittedly opposed to all development in Gwinnett County, one of metropolitan Atlanta's fastest growing areas. Hughey's first effort to prevent development of JMS's residential subdivision was an unsuccessful suit in state court filed during the course of construction. After the subdivision had been completed, Hughey sued JMS in United States District Court alleging that JMS's completed subdivision was continuing to violate the Clean Water Act by allowing storm (rain) water runoff without

possessing a National Pollutant Discharge Elimination System ("NPDES") permit setting forth the conditions under which storm (rain) water could be discharged.

The undisputed evidence showed that JMS submitted its subdivision plans and specifications to Gwinnett County for approval and on March 31, 1992, obtained a county permit to begin construction. The undisputed evidence further showed that a Clean Water Act NPDES permit was not then available in the State of Georgia from the only agency authorized to issue such permits--Georgia's Environmental Protection Division. The district court nevertheless found that the Clean Water Act absolutely prohibited the discharge of any storm (rain) water from JMS's completed subdivision in the absence of an NPDES permit. Relying on this finding and rejecting the uncontroverted testimony that some storm (rain) water discharge beyond the control of JMS would naturally occur whenever it rained, the district court issued permanent injunctive relief pursuant to Federal Rule of Civil Procedure 65(d). The injunction ordered that JMS "not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act."

The district court also fined JMS $8,500 for continuing violations of the Clean Water Act and awarded Hughey more than $115,000 in attorney fees and costs under 33 U.S.C. § 1365(d). From those orders and judgment of the district court, JMS appeals.

II. BACKGROUND

A. The Clean Water Act

In 1972 Congress passed the Clean Water Act ("CWA") amendments, 33 U.S.C. §§ 1251-1387, to remedy the federal water pollution control program which had "been inadequate in every vital aspect" since its inception in 1948. *EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 203, 96 S. Ct. 2022, 2024, 48 L.Ed.2d 578 (1976). The amended CWA absolutely prohibits the discharge of any pollutant by any person, unless the discharge is made according to the terms of a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1311(a). This "zero discharge" standard presupposes the availability of an NPDES permit, allowing for the discharge of pollutants under the conditions set forth in the permit. *Id.* § 1342(a)(1). NPDES permits are usually available from the Environmental Protection Agency ("EPA"); however, 33 U.S.C. § 1342(c)(1) suspends the availability of federal NPDES permits once a state permitting program has been submitted and approved by the EPA. Thus, if a state administers its own NPDES permitting program under the auspices of the EPA, applicants must seek an NPDES permit from the state agency. *See* 33 U.S.C. § 1342(c)(1); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L.Ed.2d 306 (1987).

On June 28, 1974, the State of Georgia was authorized by EPA to administer an NPDES program within its borders. The Georgia agency responsible for administration of that program is the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources. EPA-issued NPDES permits are thus not available in Georgia.

Even though the absolute prohibition in Section 1311(a) applied to storm water discharges, for many years the discharge

of storm (rain) water was a problem that the EPA did not want to address.[1] The EPA complained that administrative concerns precluded a literal application of the CWA's absolute prohibition--if the CWA applied to storm (rain) water discharges, the EPA would be required to issue potentially millions of NPDES permits. Years of litigation ensued when the EPA promulgated NPDES permit regulations exempting uncontaminated storm water discharges from the CWA. *See, e.g., Costle, supra* note 1.

The congressional response to this baffling situation was the Water Quality Act, Pub.L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of Title 33 U.S.C.), which amended the CWA to provide specifically that "storm water" discharges were within the CWA's proscription. *See* 33 U.S.C. § 1342(p). Because of the administrative nightmare presented by the inclusion of storm (rain) water discharges, Congress chose a phased-in approach. "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992).

The phased-in approach established a moratorium until October 1, 1992, on requiring permits for most storm water discharges. *Id.*; Water Quality Act, § 402(p), 33 U.S.C. § 1342(p). However, "discharge[s] associated with industrial

---

[1]Under the CWA, the term "pollutant" is inclusive of "rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). When rain water flows from a site where land disturbing activities have been conducted, such as grading and clearing, it falls within this description. *See, e.g., National Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377 (D.C.Cir. 1977); 40 C.F.R. § 122.2 (defining pollutant).

activity"[2] were excepted from this moratorium. Water Quality Act, § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). Section 402(p)(2)(B) required the EPA no later than February 4, 1989, to establish regulations setting forth permit application requirements for industrial storm water discharges. Those seeking such permits were to file an application no later than February 4, 1990, and permit applications were to be rejected or accepted by February 4, 1991. *Id.*

EPA failed to meet the statutory timetable, so it extended the deadline for submitting a permit application until October 1, 1992. The Natural Resources Defense Council ("NRDC") sued the EPA for granting this extension. The Ninth Circuit Court of Appeals granted NRDC's request for declaratory relief, but denied injunctive relief, stating the "EPA will duly perform its statutory duties." *NRDC v. EPA*, 966 F.2d at 1300. On September 3, 1992, the EPA confirmed the Ninth Circuit's faith by issuing its final general permits for storm water discharges associated with industrial activity; applicants were to submit their request for a permit by no later than October 1, 1992.

---

[2]Under EPA guidelines, "storm water discharge associated with industrial activity" is inclusive of construction activity, which is in turn defined as "clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x). This regulation, to the extent it sought to exempt from the definition of "industrial activity" construction sites of less than five acres, was invalidated on the grounds that it was arbitrary and capricious. *NRDC v. EPA*, 966 F.2d 1292, 1305-06 (9th Cir. 1992). Even so, the regulation still provides that industrial activity is inclusive of construction.

Since a state agency's action in advance of that taken by the EPA might be disapproved as inconsistent with the EPA's eventual position, Georgia EPD has always followed the EPA's lead in the promulgation of NPDES permits. *See generally* Georgia EPD's Amicus Brief, at 5. Consistent with this approach, Georgia EPD began the public notice portion of the storm (rain) water discharge permit promulgation process only after the EPA had acted. On September 23, 1992, less than one month after the EPA had issued its general permits, Georgia EPD issued public notice of its intent to issue two general permits, one of which would cover storm water discharges from construction activities involving land-disturbing activities of five acres or more. An affidavit from the section chief of Georgia EPD's Water Protection Branch summarized the state of the law in Georgia up to that time: "[N]o NPDES program for issuing NPDES permits has been in place [in Georgia] for storm water runoff from construction activities."

B. The JMS Residential Subdivision

In early 1992-when NPDES permits covering storm (rain) water were not available in Georgia--JMS planned to develop its 19.2 acre residential subdivision and for that purpose submitted its plans and specifications to Gwinnett County. In developing these plans and specifications, JMS hired a firm of consulting engineers, who were to supervise the design and control of sedimentation control measures and help ensure that JMS remained in compliance with relevant pollution control requirements.

On March 31, 1992, JMS received a permit from Gwinnett County authorizing it to conduct land-disturbing

activities.[3] In accordance with requests from state and county officials, JMS spent more than $30,000 installing state of the art sedimentation control devices, including silt fences, check dams, vegetation, sloping, and a sedimentation retention basin. The erosion and sedimentation control measures met or exceeded Gwinnett County's requirements.

Prior to beginning construction, JMS had done everything possible to comply with the legal requirements of building a small residential subdivision. On the county level, County Inspector George Michael Fritcher deposed that JMS was in compliance; at the state level, David Word, Chief of EPD's Water Protection Branch, stated that EPD would not (could not) have done anything with respect to an NPDES permit for storm water discharges even if JMS had applied for one prior to beginning the development; and at the federal level resort to the EPA was foreclosed to JMS because, as noted, Georgia's NPDES program exists in lieu of the federal NPDES program.

With Gwinnett County's blessing, JMS began to clear, grade, and grub the property for the construction of streets, gutters, and storm sewers. JMS channeled its discharge of rain water as dictated by the county permit requirements. The discharges that occurred, as noted by the district court, were

---

[3]According to David Tucker, Development Review Manager for Gwinnett County, this permit served as "authorization for land-disturbing activity as required by the Development Regulations of Gwinnett County [, which] has the authority to administer [Georgia's] Soil Erosion and Sedimentation Control Act of 1975 in Gwinnett County. As part of this permitting procedure, JMS Development Corporation submitted a soil erosion and sedimentation control plan which was approved by the Gwinnett County Planning and Development." *See also* Billew Affidavit; Ballard Affidavit (exh. A).

minimal and posed "no threat to human health." Further, much of the damage caused by the discharges would have been "reversed with the passage of a relatively short amount of time." Within this 19.2-acre subdivision, approximately 4.64 acres were disturbed by actual construction of storm sewers, curb, guttering, and streets.

Once all subdivision construction had been completed and the storm sewers, curbing, gutting, and streets had been dedicated or conveyed to Gwinnett County, a plat of the completed subdivision showing approval by Gwinnett County's various agencies was recorded in the land records of Gwinnett County on August 6, 1992. JMS was from this point forward engaged in no further construction or land disturbing activities.

C. Hughey's Clean Water Act Civil Action

On August 28, 1992, Hughey sued JMS under the citizen's suit provision of the Clean Water Act, 33 U.S.C. § 1365,[4] alleging that JMS had violated the CWA by discharging storm (rain) water from a "point source" on its property into "the waters of the United States" without an NPDES permit. *See* 33 U.S.C. §§ 1311, 1342. Hughey alleged that JMS's discharges of storm (rain) water were in association with industrial activity. *See* 40 C.F.R. § 122.26(b)(14)(x) (industrial activity includes construction, which in turn encompasses

---

[4]Section 1365(a) authorizes any citizen to "commence a civil action on his own behalf--(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . . " The section further provides that "effluent standard or limitation" is inclusive of "an unlawful act under subsection (a) of section 1311 of this title." Section 1311(a) makes it unlawful to discharge any pollutant without an NPDES permit.

clearing, grading, and grubbing). Because JMS's construction activities were considered "industrial" by EPA *regulations*, Hughey contended that JMS was required to have an NPDES permit. *See* Water Quality Act, Section 402(p)(2)(B) (establishing permit deadline for discharges associated with industrial activities). To the extent JMS had discharged without a permit, Hughey argued that JMS was subject to the "zero discharge" standard imposed by Section 1311(a). Hughey's complaint sought a declaratory judgment that JMS was liable under the CWA, as well as injunctive relief against JMS in several forms. Contemporaneously with his complaint Hughey filed a motion for a temporary restraining order ("TRO"), which the court granted after hearing from both sides on August 31, 1992.

Hughey's factual allegations were that JMS's activities caused two watercourses to become muddied during rainfall events.[5] The first of these watercourses is a small stream[6] that originates on JMS's property and traverses neighboring land for close to nine hundred (900) feet before emptying into the Yellow River, which is the second flow of water involved. Twenty-eight hundred (2800) feet below the stream's

---

[5]The court notes as an aside that a question of fact existed concerning the degree to which JMS was responsible for increased turbidity levels in these two watercourses during rainfall events. This pivotal question of fact was not decided by a jury as demanded by JMS, but rather by the district judge. *See infra* note 13.

[6]At least one expert at trial described the stream as a wet weather flow, and indeed, JMS's consulting engineer stated in his affidavit that United States Geological Survey Maps do not even delineate this unnamed tributary as a stream at all. JMS described the stream as ranging from three to seven feet in width.

confluence with the Yellow River lives Mr. Hughey, who owns and resides on land abutting the Yellow River.

JMS initially responded to the complaint with a motion to dissolve the TRO and a motion for summary judgment. JMS conceded that rain water had run off its property and that it did not have an NPDES permit authorizing discharges under the CWA. However, JMS showed that no such permit was available from any government agency and that it had in fact obtained every permit that was available prior to initiating construction.[7] JMS then answered the complaint denying liability under the CWA and demanding a jury trial.

On November 9, 1992, the district court denied JMS's motions to dissolve the TRO, to dismiss the complaint, and for summary judgment. The district court granted Hughey's motion for preliminary injunctive relief, finding that JMS was

---

[7]The consulting engineers hired by JMS, in addition to seeking (and obtaining) county land disturbing permits, eventually applied for an NPDES permit from Georgia EPD on September 28, 1992, after Hughey had filed this action. Georgia EPD responded by saying no action would (could) be taken with respect to the notice of intent. David Word, Chief of the Water Protection Branch of Georgia EPD, commented on the effect of JMS's application:

> EPD has received a notice of intent to comply with the general permit from JMS Development Corporation for its subdivision in Gwinnett County, Georgia. No action will be taken on this notice of intent until a general permit becomes effective. Therefore, at this time [10/8/92], *no further action is required or necessary on the part of JMS Development Corporation to be authorized lo discharge storm water into waters of the State of Georgia from the subject property.*
>
> Word Aff., at ¶ 10 (emphasis supplied). Georgia EPD simply did not have a permit to issue, either before, during, or after the subdivision's development. JMS presented this evidence to the district court in its motion to dismiss.

potentially liable for storm (rain) water discharges made subsequent to October 1, 1992. The preliminary injunction prohibited JMS from "discharg[ing] storm water into waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place, without a National Pollutant Discharge Elimination System permit permitting such discharge."

More than one year later, on December 15, 1993, the district court found JMS liable under the CWA for storm (rain) water discharges into the stream on thirteen dates in 1992-June 8, 14, 30; July 1, 2; August 13, 16; September 4, 5, 27, 28; and October 4, 8. The court further found that JMS once, on June 8, 1992, discharged storm water into the Yellow River itself These violations according to the district court were continuing (albeit minimal), see Order of 2/24/94, at 4, 8, and became the basis for the court's permanent injunction several months later, which issued on February 24, 1994.[8] Defendant in that order

---

[8]Although Georgia EPD stated in its amicus brief to the district court on October 27, 1992, that it expected to issue general NPDES permits covering storm (rain) water discharges by December 1992, such a permit was still not available as of the date on which the district court granted permanent injunctive relief.

Georgia EPD did issue its general permit; however, Mr. Hughey appealed the issuance of that permit in a separate action to the Board of Natural Resources for the State of Georgia, alleging both procedural and substantive defects in the general permit.

The administrative law judge remanded the permit to the Director of Georgia EPD because of Georgia EPD's failure to comply with procedural rules. In addition, the ALJ noted that a remand was also necessary for the Director to consider turbidity levels for storm (rain) water discharges. Due to Mr. Hughey's appeal, there was still no NPDES permit available in Georgia for the discharge of storm (rain) water when the district court entered the permanent injunction.

was instructed not to discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.* (emphasis supplied). On account of JMS's specific violations of the CWA, the district court required JMS to pay $8,500 in civil penalties to Hughey.[9] Lastly, the court ordered JMS to pay Hughey more than $115,000 in attorney fees and costs pursuant to 33 U.S.C. § 1365(d).

III. ISSUES ON APPEAL

JMS argues that the broad generalized language of the injunction, which in effect says nothing more than to "obey the law," is violative of the standard of specificity required by Federal Rule of Civil Procedure 65(d). JMS's second contention is that it should not be punished for failing to secure an NPDES permit when no such permit was available. Finally, JMS objects to the award of attorney fees and costs.[10] JMS has not objected, however, to the fact that it did not receive a jury trial on the question of liability.

---

[9]Hughey concedes that requiring payment of civil penalties to him was clear error by the district court. Civil penalties under the Clean Water Act can only be paid to the United States Treasury. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990).

[10]Hughey filed a cross appeal complaining that $115,000 was an insufficient award. When JMS was forced into bankruptcy, the cross appeal was automatically stayed under 11 U.S.C. § 362. *See* Appellee's Brief, at xiv n. 1. For the reasons that follow, we need not consider the merits of that appeal.

IV. STANDARD OF REVIEW

[1] Although the grant of permanent injunctive relief is generally reviewed for an abuse of discretion, "if the trial court misapplies the law we will review and correct the error without deference to that court's determination." *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993), *cert. denied*, -- U.S.--, 114 S.Ct. 696, 126 L.Ed.2d 663 (1994). *See also Guaranty Fin. Svcs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir. 1991) ("if the court misapplied the law in making its decision [to grant the preliminary injunction] we do not defer to its legal analysis"). We review questions of law de novo. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995).

V. DISCUSSION

A. Liability Under the Clean Water Act

As noted, the CWA imposes a "zero discharge" standard in the absence of an NPDES permit. 33 U.S.C. § 1311(a). The question is whether Congress intended for this zero discharge standard to apply in the circumstances of this case.

[2] In interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results. *United States v. X-Citement Video, Inc.*, ___U.S. ___, ___, 115 S. Ct. 464, 468, 130 L.Ed.2d 372 (1994); *Towers v. United States (In re Pacific-Atlantic Trading Co.)*, 64 F.3d 1292, 1303 (9th Cir. 1995). Courts will not foolishly bind themselves to the plain language of a statute where doing so would "compel an odd result." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S. Ct. 1981, 1984, 104 L.Ed.2d 557 (1989). For, "'it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have

some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'" *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55, 109 S. Ct. 2558, 2567, 105 L.Ed.2d 377 (1989) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S. Ct. 193, 90 L.Ed. 165 (1945)). *Cf Green v. Bock Laundry Mach. Co.*, 490 U.S. at 527-30, 109 S. Ct. at 1994-95 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the [language] . . . that avoids this consequence . . . ").

Our jurisprudence has eschewed the rigid application of a law where doing so produces impossible, absurd, or unjust results. "[I]f a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result." *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L.Ed. 226 (1892)); *see also United States v. Castro*, 837 F.2d 441, 445 (11th Cir. 1988). "[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed [the purpose of the act], rather than the literal words." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S. Ct. 852, 857, 15 L.Ed.2d 827 (1966) (internal quotation marks omitted).

As is often the case, the legislature will use words of general meaning in a statute,

> words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding

> its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Public Citizen, 491 U.S. at 454, 109 S. Ct. at 2566-67 (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L.Ed. 226 (1892)) (emphasis supplied). Thus, this court has found that

> [g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Zwak v. United States, 848 F.2d 1179, 1183 (11th Cir. 1988) (quoting *Sorrells v. United States*, 287 U.S. 435, 447, 53 S. Ct. 210, 214, 77 L.Ed. 413 (1932)). For instance, common sense says that a law making it a felony for a prisoner to escape from jail "does not extend to a prisoner who breaks out when the prison is on fire--'for he is not to be hanged because he would not stay to be burnt.'" *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487, 19 L.Ed. 278, 280 (1869).

[3] In this case, once JMS began the development, compliance with the zero discharge standard would have been impossible. Congress could not have intended a strict application of the zero discharge standard in section 1311(a) when compliance is factually impossible. The evidence was uncontroverted that whenever it rained in Gwinnett County

some discharge was going to occur; nothing JMS could do would prevent all rain water discharge. George Fritcher, the county inspector charged with monitoring JMS's compliance with Gwinnett County's development permit, deposed that it was simply impossible to stop sediment from leaving the subdivision when there was a rainfall event. "[Z]ero discharge of storm water will never *be achieved* because rainfall must find its way back into the streams and rivers of this state." Georgia EPD Amicus Brief, at 13 (emphasis supplied). Doug Ballard, president of JMS, similarly testified on cross-examination by Hughey's counsel that he could not stop the rain water that fell on his property from running downhill, and that nobody could. The rain that fell on his property "is designed to go down those curbs and designed to go down those pipes and unless you go out there and collect it in your hand some way or other it's going to have to go somewhere."

Moreover, JMS obtained from Gwinnett County a development permit that was issued pursuant to the County's authority under Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("SESCA"), O.C.G.A. §§ 12-7-1 *et seq.* That Georgia statute, like the CWA, limited storm water discharges during the applicable period. *See* O.C.G.A. § 12-7-6(18) (1992). Moreover, Georgia EPD's proposed standards for a general NPDES permit for storm water discharges are similar to the standards for storm water discharges contained in SESCA. David Word, the Chief of the Water Protection Branch of Georgia EPD, testified by affidavit that "the general NPDES permit proposed for storm water runoff from construction activities . . . will require permittees to perform certain erosion and sedimentation control practices, [which are] currently required under authority of the Erosion and Sedimentation Control Act of 1975." Accordingly, the fact that

JMS was issued a development permit by Gwinnett County suggests that JMS would have been able to obtain an NPDES permit from Georgia EPD, had such a permit been available.

The facts of this case necessarily limit our holding to situations in which the storm water discharge is minimal, as it was here. The district court found that JMS's "discharges pose no threat to human health, and that much of the damage [caused by such discharges] will be reversed with the passage of a relatively short amount of time."

This was not a case of a manufacturing facility that could abate the discharge of pollutants by ceasing operations. Nor did the discharger come to court with unclean hands: JMS made every good-faith effort to comply with the Clean Water Act and all other relevant pollution control standards. The discharges were minimal, and posed no risk to human health. In sum, we hold that Congress did not intend (surely could not have intended) for the zero discharge standard to apply when: (1) compliance with such a standard is factually impossible; (2) no NPDES permit covering such discharge exists; (3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and (4) the discharges were minimal. *Lex non cogit ad impossibilia*: The law does not compel the doing of impossibilities. BLACK's LAW DICTIONARY 912 (6th ed. 1990).

Practically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that. Under these circumstances, denying summary judgment to JMS was an error of law. *Cf Menzel v. County Utilities Corp.*, 712 F.2d 91, 95 (4th Cir. 1983) (refusing to impose CWA liability for discharges during period in which effectiveness of NPDES permit was stayed by state court, since

subjecting discharger to liability would serve no statutory purpose).

B. The Permanent Injunction-Federal Rule *of* Civil Procedure 65

In addition to the fact that an injunction based upon an erroneous conclusion of law is invalid, *see United States v. Jefferson County*, 720 F.2d 1511, 1520 n. 21 (11th Cir. 1983), Rule 65(d) of the Federal Rules of Civil Procedure mandates dissolution of the injunction.

Rule 65(d) sets forth the standards of specificity that every injunctive order must satisfy.

> Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . .

Rule 65 serves to protect those who are enjoined

> by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order. As a result, one of the principal abuses of the pre-federal rules practice--the entry of injunctions that were so vague that defendant was at a loss to determine what he had been restrained from doing--is avoided. The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.

11A WRIGHT, MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2955 (1995) (footnotes omitted). In addition to giving those enjoined "fair and precisely drawn notice of what the injunction actually prohibits," *Epstein Family Partnership v. K-Mart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994), the specificity requirement of Rule 65(d) serves a second important function:

> Unless the trial court carefully frames it orders of injunctive relief, it is impossible for an appellate tribunal to know precisely what it is reviewing. We can hardly begin to assess the correctness of the judgment entered by District Court here without knowing its precise bounds. In the absence of specific injunctive relief, informed and intelligent appellate review is greatly complicated, if not made impossible.

Schmidt v. Lessard, 414 U.S. 473, 476, 94 S. Ct. 713, 715, 38 L.Ed.2d 661, 664 (1974).

[4] Consistent with the two foregoing purposes, appellate courts will not countenance injunctions that merely require someone to "obey the law." *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 897-98 (5th Cir.), cert. denied, 439 U.S. 835, 99 S. Ct. 118, 58 L.Ed.2d 131 (1974).[11] "Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement . . . does not give the restrained party fair notice of what conduct will risk contempt." *Epstein Family Partnership, supra*. Because of the

---

[11]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

possibility of contempt, an injunction "must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Id.* (internal quotation marks omitted). An injunction must therefore contain "an operative command capable of 'enforcement.'" *Longshoremen's Ass'n. v. Maine Trade Ass'n.*, 389 U.S. 64, 73-74, 88 S.Ct. 201, 206-07, 19 L.Ed.2d 236, 244 (1967). *See also United States Steel Corp. v. United Mine Workers*, 598 F.2d 363, 368 (5th Cir. 1979) (party subject to contempt proceeding may defend on basis that compliance was not possible).

Here, the district court's order granting permanent injunctive relief only stated:

> Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place *if such discharge would be in violation of the Clean Water Act.*

(emphasis supplied).

[5] Not only was this an "obey the law" injunction, it was also incapable of enforcement as an operative command. The court's order merely required JMS to stop discharges, but failed to specify how JMS was to do so. Discharges, though not defined by the order, occurred only when it rained, and any discharge was a violation of the order. Rain water ran into the subdivision's government approved streets and storm sewers; then into the small stream that started on the subdivision property; on into a tributary stream; and eventually into the Yellow River. Was JMS supposed to stop the rain from falling? Was JMS to build a retention pond to slow and control

discharges? Should JMS have constructed a treatment plant to comply with the requirements of the CWA?

The injunction's failure to specifically identify the acts that JMS was required to do or refrain from doing indicates that the district court--like the CWA, the EPA, Georgia EPD, and Mr. Hughey--was incapable of fashioning an operative command capable of enforcement. As such, we must vacate this "obey the law" injunction.[12]

C. Award of Attorney Fees and Costs

[6] A court issuing any final order in a Clean Water Act citizen's suit "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). A prevailing or substantially prevailing party is one who prevailed "in what the lawsuit originally sought to accomplish." *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 887 (9th Cir. 1993).

The district court here awarded Hughey more than $115,000 in attorney fees and costs. However, for the reasons stated above Hughey's citizen suit has not accomplished its original objective. Hughey is not a prevailing or substantially

---

[12]Hughey contends that the injunction contains the requisite specificity by reference to the prior orders granting injunctive-type relief, i.e., that the permanent injunction merely continued in place what previous orders had already done. *See, e.g., Keyes v. School Dist. No. 1., Denver, Colo.*, 895 F.2d 659 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951, 112 L.Ed.2d 1040 (1991). We doubt that such an exception exists, unless in very rare, exceptional cases. A person enjoined by court order should only be required to look within the four corners of the injunction to determine what he must do or refrain from doing. That was not the case here.

prevailing party and is thus not entitled to an award of attorney fees and costs. *See Save Our Community v. United States EPA*, 971 F.2d 1155, 1167 (5th Cir. 1992) (where district court erred in finding defendant liable under the CWA, the award of attorney fees based thereon was also inappropriate).

VI. CONCLUSION

Imposing liability upon JMS under these circumstances was a miscarriage of justice. It is inconceivable that Congress intended, let alone foresaw, a result such as this under the Clean Water Act. Environmentally safe waters are of vital importance to this nation as is evident from the fact that Congress enacted an entire statutory scheme to address the problem. Nevertheless,

> [t]he inability of [Georgia EPD] to meet its statutory obligations has distorted the regulatory scheme and imposed additional burdens which must be equitably distributed. This task is a difficult one because of the nature of the available options. Either the affected discharger must be compelled to risk potential enforcement proceedings in spite of [the complete unavailability of an NPDES permit], or society must tolerate slippage of an interim pollution abatement deadline.

Republic Steel Corp. v. Train, 557 F.2d 91, 94 (6th Cir. 1977). Balancing these concerns on the basis of the record before us, we refuse to place the burden on JMS.

The orders imposing statutory penalties and attorney fees and costs were premised on the finding that JMS was

liable under the CWA. Because we REVERSE this finding of liability, those orders are VACATED.

The injunctive relief issued by the district court on February 24, 1994, was improper not only because it was premised on an error of law, but also for the alternative reasons that the injunction lacked the specificity required by Rule 65(d), and compliance with its terms was impossible. Accordingly, the permanent injunction is DISSOLVED.[13]
IT IS SO ORDERED.

CARNES, Circuit Judge, concurring:

I concur in all of the Court's holdings and opinion except for Part V.B. What the Court says there about Rule

---

[13]Because JMS has not raised the jury trial question, we will not address it now for the first time, although it would appear to require summary reversal on the issue of liability. *See Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L.Ed.2d 365 (1987) (defendants under the CWA have Seventh Amendment right to a jury trial on questions of liability).

Because we have determined that JMS cannot be liable no matter who files the complaint, we do not discuss JMS's challenge to the propriety of the citizen's suit. *See, e.g., Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376, 98 L.Ed.2d 306 (1987) (citizen suits should be interstitial, not intrusive); *Northwest Environmental Advocates v. Portland*, 11 F.3d 900, *vacated*, 56 F.3d 979 (9th Cir. 1995) (initially deciding citizen suits were unauthorized when challenging water quality standards in an NPDES permit, latter opinion found citizen suits were not so limited); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1014 n. 11 (3rd Cir. 1988) (refusing to decide whether scope of citizen suits was limited).

We also decline to address the issues of Hughey's standing, JMS's substantive due process challenge, and the fee award's lodestar calculation, as they are rendered unnecessary by the holding herein.

65(d) and "obey the law" injunctions may be correct, or it may be incorrect, but it is certainly dicta. Given our holding that the plaintiff in this case is not entitled to any relief at all, it matters not whether the relief he was given would have been in proper form if he had been entitled to some relief.

Date: April 1, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8402

TERENCE D. HUGHEY,
Plaintiff-Appellee,
v.
JMS DEVELOPMENT CORPORATION,
Defendant-Appellant.

No. 94-8855

TERENCE D. HUGHEY,
Plaintiff-Appellee,
Cross-Appellant,
v.
JMS DEVELOPMENT CORPORATION,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the
Northern District of Georgia

[89 F.3d 857]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion April 1, 11th Cir., 1996, F.2d).

Before: ANDERSON and CARNES, Circuit Judges, and OWENS*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[signed]

UNITED STATES CIRCUIT JUDGE

*Honorable Wilbur D. Owens, Jr., U.S. District Judge for the Middle District of Georgia, sitting by designation.

Date: June 17, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION FILE
vs.	)	
	)	NO. [1:92-cv-2051-RHH]
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	
	)	

TEMPORARY RESTRAINING ORDER

The above and foregoing Verified Complaint having been read and considered, and the Plaintiff's Motion for Temporary Restraining Order having been considered and heard, and the Plaintiff having shown that immediate and irrevocable injury will result to the Plaintiff if such a restraining order is not issued, and it appearing to the Court that a proper case has been made out for a temporary restraining order, it is hereby ordered and adjudged:

1.

That a temporary restraining order is hereby issued to defendant JMS Development Corporation and any of its successors, assigns, successors in interest, subsidiaries or affiliates, restraining them from discharging sand, silt, asphalt

runoff and other pollutants into any waters of the United States without a permit. ... Said defendant is so restrained for a period of ten (10) days after entry of this order.

2.

That the parties appear before the Court on the 31 day of August, 1992 at 11:45 o'clock A.m. for a hearing on the preliminary injunction to be held in Room in the Richard B. Russell Federal Building.

SO ORDERED this 31 day of Aug, 1992 at 12:05 o'clock P.m.

[signed]
Judge, United States District Court, Northern District of Georgia, Atlanta Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	CIVIL ACTION NO.
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
Defendant.	)	

ORDER

Upon consideration by the court of the above-entitled action,

IT IS HEREBY ORDERED that the court's temporary restraining order dated August 31, 1992, is continued for a period of 60 days.

FURTHER, parties are to appear before this court on November 5, 1992, at 9:30 a.m., for a hearing to be held in Courtroom 2108 on the motion for preliminary injunction.

SO ORDERED this 11th day of September, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on (1) Defendant's Motion to Dissolve the TRO [14], (2) Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment [16], (3) Plaintiff's Motion for a Preliminary Injunction [1], and (4) Plaintiff's Motion to Hold Defendant in Contempt of Court [13]. The Court has jurisdiction over the case pursuant to 28 U.S.C. § 1331, 33 U.S.C. § 1365(a), and 28 U.S.C. § 1361. The Court DENIES Defendant's Motion to Dissolve the TRO, DENIES Defendant's Motion to Dismiss, GRANTS Plaintiff's Motion for a Preliminary Injunction, and DENIES Plaintiff's Motion to Hold Defendant in Contempt of Court.

BACKGROUND

A. Facts.

Defendant, JMS Development Corporation, is a Georgia corporation engaged in the development of a 19.2 acre

subdivision known as Rivercliff Place ("the subdivision" or "the property"), in Gwinnett County Georgia. Plaintiff, Terence Hughey, is a resident of Gwinnett County, and owns property in the county, adjacent to the Yellow River, and topographically downhill from the subdivision. Plaintiff claims that Defendant is violating the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq. ("the CWA"), by discharging from the subdivision, without a permit, sedimentation collected in rain-water runoff, that travels off of the property, into a stream, and into the Yellow River.

The subdivision contains 50 lots for the construction of residential homes. Forty-six of these lots are currently owned by Defendant. Defendant has sold the remaining four lots to builders who have begun constructing homes on each. No construction has begun on Defendant's forty-six lots. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing and grading an area of the property for the construction of three streets, with related curbing, gutters and storm sewers. Defendant alleges that its street construction involved the disturbance of approximately 4.64 acres of land. Defendant's Motion to Dissolve, p. 2. Plaintiff concedes this fact, but argues that Defendant's total land disruption involved more than five acres. On August 6, 1992, Defendant dedicated the streets, curbing, gutters and storm sewers to Gwinnett County, and the county accepted same.

Defendant alleges that it has obtained all applicable permits and approvals necessary from Gwinnett County. See Affidavit of David Tucker, ¶ 3. on March 31, 1992, prior to commencing its clearing, grubbing and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing

activity in the subdivision, and permitting it, under state law, to discharge certain amounts of stormwater[1]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA restricts the concentration of silt that can be discharged in stormwater in Georgia. The Act prohibits stormwater discharges that are more than "50 nephelometric turbidity units ["NTUs"] higher than the turbidity level of the receiving stream immediately upstream from the stormwater runoff discharge at the time of such discharge . . . . of O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at the October 16, 1992 hearing that Defendant had violated the SESCA's fifty NTU limitation. See Testimony of Dr. Wade Nutter. The record regarding Defendant's compliance with the CWA is sufficient for the Court to rule on the parties' motions, and any possible findings as to Defendant's compliance with the SESCA would not warrant a different outcome. Nor is it necessary at this stage in the litigation to rule on Defendant's compliance with the SESCA. The Court's discussion, therefore, will focus primarily on Defendant's compliance with the CWA.

Defendant, however, does not have a National Pollutant Discharge Elimination System ("NPDES") stormwater permit, which is required in order to exempt oneself from the CWA's federal prohibition on discharging stormwater. Defendant's failure to obtain an NPDES permit is due, at least in part, to the

---

[1]Under both federal and state law, the term "stormwater" is used for water that contains sedimentation from land disturbing activities

State of Georgia's failure to make NPDES stormwater permits available to potential applicants (see infra).

On August 28, 1992, Plaintiff filed a Complaint with this Court, alleging that Defendant had violated the CWA by allowing stormwater to run off of its property, and into the Yellow River, without possessing an NPDES stormwater permit. [1]. Plaintiff requested that the Court enjoin Defendant, and award damages. Defendant alleges that it ceased all land-disturbing activities on the property prior to Plaintiff's complaint. Defendant's Motion to Dissolve, p. 5. Defendant asserts also that it has expended over $30,000 installing "state of the art" erosion and sediment control structures pursuant to instruction of Gwinnett County and Georgia state officials. Defendant's Motion to Dissolve, pp. 4, 5. The structures include: siltation fencing, check dams, grassing, sloping, and a sediment retention structure. Id.; Woodall Affidavit, ¶ 3. These structures, however, are designed only to minimize release of stormwater, and, accordingly, stormwater continues to leave the subdivision during rainfall and enter the Yellow River.

On August 31, 1992, the Court issued a Temporary Restraining Order, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5-1]. On September 11, 1992, the Court extended the TRO for 60 days. [11-1].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged stormwater, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. [13]. In its motion, Plaintiff requests the Court to fine Defendant $25,000 for each day of violation. Id. at p. 2. On October 15, 1992, Defendant filed a Motion to Dissolve the

TRO. [14]. The Court heard oral arguments on both motions on October 16, 1992. Also on October 16, 1992, Defendant filed a Motion to Dismiss Plaintiff's complaint, or in the alternative, to grant Defendant Summary Judgment. [16].

B. The Clean Water Act, and the NPDES Permitting Program.

In 1972, Congress amended the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Pursuant to this objective, the Act prohibits the discharge of any pollutants from a "point source[2]," except in accordance with standards promulgated in permits issued under other sections of the Clean Water Act. 33 U.S.C. § 1311(a). The permitting scheme requires that persons seeking to so discharge pollutants must obtain an NPDES permit, either from the Environmental Protection Agency ("the EPA"), or from their respective state environmental agency if the EPA has delegated authority to the state to issue the permits. 33 U.S.C. § 1342.

The Act also authorizes individuals to commence suits on their own behalf ("citizen suits"). 33 U.S.C. § 1365(a). A person may bring a citizen suit against "any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the Act]." Id. The term "effluent standard or limitation" includes "any restriction established by a State or the Administrator on quantities, rates, and concentrations of [covered discharges]." Id. § 1362(11). Thus, Plaintiff is

---

[2]The CWA defines "point source" as "any discernable, confined and discreet conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged. 33 U.S.C. § 1362 (14).

authorized to bring a citizen suit against Defendant for violating either the CWA zero-discharge-without-a-permit limitation, or the SESCA's fifty NTU limitation.

On June 28, 1974, the State of Georgia received authority to administer the NPDES program within its borders. Pursuant to this grant of authority, the CWA is now implemented in Georgia by the Georgia Water Quality Control Act ("the GWQCA"), O.C.G.A. § 12-5-20 et seq. Georgia, in turn, has delegated the authority to issue NPDES permits to the Environmental Protection Division of the Georgia Department of Natural Resources ("the EPD"). O.C.G.A. § 12-5-20.

The United States Environmental Protection Agency has declared stormwater runoff to be "the leading [and the] largest remaining, virtually unaddressed source of water pollution [in the United States]." EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT in EPA Environmental News (September 3, 1992). See also 55 Fed. Reg. 47,991; Natural Resources Defense Council v. U.S. EPA, 966 F.2d 1292, 1295 n. 3 (9th Cir. 1992). The Clean Water Act, however, did not explicitly address stormwater discharges until it was amended in 1987. In that year, Congress enacted the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 33 U.S.C.), and created a new regulatory scheme for stormwater discharges. See 33 U.S.C. § 1342(p). Congress amended the regulatory scheme, in 1991, to its present form. Pub. L. No. 102-240, § 1068, 105 Stat. 2007.

Section 1342 (p) prohibited the EPA, or states to which NPDES permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for stormwater discharges. 33 U.S.C. § 1342 (p)(1). The section also excepted from the moratorium discharges "associated with

industrial activities." Id. § 1342(p)(2)(B). Federal regulations define "industrial activities" as construction involving five or more acres. 40 CFR 122.26(b)(14)(x). Thus, prior to October 1, 1992, a person did not violate the CWA by discharging stormwater without an NPDES permit, so long as the discharge was not associated with construction involving five or more acres of land. Subsequent to October 1, 1992, and continuing today, a person does violate the CWA by discharging stormwater without an NPDES permit, regardless of with what size or type of land the discharge is associated.

The Water Quality Act also imposed deadlines prior to October 1, 1992 for the EPA, or states with delegated authority, to establish NPDES permit application requirements, and to accept and respond to applications. 33 U.S.C. § 1342(p)(4). The EPA, however, failed to comply with these deadlines. Not until September 9, 1992 did the EPA make available a "general NPDES permit" to cover stormwater discharges falling under § 1342(p)(2)(B). 57 Fed. Reg. 41,176 - 41,233 (September 9, 1992). The EPD, apparently in an effort "to be consistent with the federal program," has consistently waited until after the EPA has acted before implementing each step of its permit authorization process. See EPD's Amicus Curiae Brief, p. 8. On September 23, 1992, eight days before 33 U.S.C. § 1342(p)'s moratorium expired, the EPD issued a public notice of its proposal to issue two general NPDES permits for stormwater discharges. Georgia Department of Natural Resources, Public Notice No. 92-16 (appended to EPD's Amicus Curiae Brief at Exhibit 5). The first proposed permit -General Permit No. GAR100000- will authorize stormwater discharges "associated with industrial activity." See EPD's Amicus Curiae Brief, Exhibit 6. The second proposed permit -General Permit No. GAR100000- will authorize stormwater

discharges associated with "construction activities involving land disturbing activities of five or more acres." See Id. The EPD testified at the October 16, 1992 hearing on Plaintiff's Motion to Hold Defendant in Contempt of Court that it anticipated the permits would be available by the end of 1992. It is important to note, however, that neither proposed permit will cover stormwater discharges from construction activities involving land disruption of less than five acres. See Id.

DISCUSSION

A. Defendant's Motion to Dismiss Plaintiff's Claim, and Motion for Summary Judgment.

In consideration of a Rule 12 (b)(6) motion, the Court, generally, may look only at the pleadings. See Fed. R. Civ. P. 12(b). However, when matters outside the pleadings have been presented to, and not excluded by the Court, the Court will treat Defendant's motion as one for summary judgment, and will consider the parties' evidence. Id. The motion is then disposed of as provided in Fed. R. Civ. P. 56. Id.

In accordance with Fed. R. Civ. P. 56, this Court will grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a mater of law." In cases such as this where the movant is the defendant, that party must demonstrate that the nonmoving party, the plaintiff, lacks evidence to support an essential element of her or his claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988).[3] The movant's burden is "discharged by showing -- that is,

---

[3]In contrast, where the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim. See Id.

pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. However, it is not enough in most situations for the movant merely to point out to the court this absence of evidence. Id. at 323; Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). Rather, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

Only after the movant meets its initial burden does any obligation on the part of the nonmovant arise. Id.; Adickes v. S. H. Kress & Co., 398 U.S. 144, 160 (1970); Clark, 929 F.2d at 608. Nevertheless, once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Celotex, 477 U.S. at 325. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

All evidence and factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly

probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to survive a motion for summary judgment, the nonmoving party must come forward with specific evidence of every element essential to his or her case so as to create a genuine issue for trial. Celotex, 477 U.S. at 323; Rollins, 833 F.2d at 1528.

Defendant argues that the Court should dismiss Plaintiff's suit on the following grounds: (1) Plaintiff fails to state a claim upon which relief may be granted because he neglected to plead that Defendant's construction activities involves land disturbances of "greater than five acres." (2) Plaintiff lacks standing because "there exists no manageable or precise benchmarks to guide this court in granting the prospective relief demanded by plaintiff," (3) the EPD has primary jurisdiction, and (4) Plaintiff failed to join an indispensable party. Defendant's Motion to Dismiss, pp. 7-12.

In the instant case, matters outside the pleadings have been presented to, and have not been excluded by the Court. Additionally, Plaintiff was given notice of Defendant's Motion for Summary Judgment, and adequate time to respond, and did so respond. The Court, therefore, will treat Defendant's motion as one for summary judgment, and will consider the parties' evidence. See Fed. R. Civ. P. 12(b).

1. Failure to State a Claim.

Evidence presented at the October 16, 1992 hearing demonstrates that Defendant's construction activities involved land disruption of less than five acres. See Affidavit of J. Dennis Billew, 14. As of October 1, 1992, the CWA no longer provides an exception to land disturbances of five acres or less. 33 U.S.C. § 1342(p). Thus, evidence is before the Court that Defendant may be liable for discharges made subsequent to

October 1, 1992. The Court, therefore, denies Defendant's Motion for Summary Judgment on Defendant's first-stated ground.

2. Standing.

Defendant asserts that Plaintiff does not have standing under the CWA because the Act does not permit citizen suits where the relief sought would require the court to make complex findings of fact and engage in an independent process of standard-setting. Defendant's Motion to Dismiss, p. 8. The CWA provides that any citizen may commence a civil action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . ." 33 U.S.C. § 1365(a). The term "effluent standard or limitation" is defined in such a way that citizens may bring suit against any person alleged to be discharging pollutants into waters of the United States without a valid NPDES permit. See 33 U.S.C. § 1311(a).

Defendant cites the Act's legislative history for the proposition that authorization of citizen suits is restricted to cases in which there exist "manageable and precise benchmarks for enforcement" by the courts. The legislative history actually states that the Act was drafted in such a way as to make "[e]nforcement of pollution regulations . . . . not a technical matter beyond the competence of the courts." S. Rep. No. 414, 92d Cong., 2d Sess. 80 (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3747. Because the Act was so drafted, "citizen suits [will facilitate] the development of clear and identifiable requirements [that will in turn] provide manageable and precise benchmarks for enforcement." Id. Thus, the legislative history shows not that the citizen suit provision should be limited to suits where there are

"manageable and precise benchmarks for enforcement," but that the provision was drafted so as to include courts in the development of "manageable and precise benchmarks for enforcement." See also Id. at 3746 ("It is the [Senate Public Works] Committee's intent that enforcement of [a violation of an effluent standard or limitation established under the Act] be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."); Georgia Environ. Project v. Atlanta, No. 90-345, slip op. at 15-16 (N.D. Ga. June 27, 1991) (Moye, J.) ("GEP I") ("[c]itizens suits are proper where, as here, 'the Federal, State and Local agencies fail to exercise their enforcement responsibility.' . . . It is the EPD's failure or refusal to prohibit the continuing violations which necessitated this suit. The very purpose of the citizens' liberal right of action [under the FWPCA] is to stir slumbering agencies") (citations omitted).

Even if the courts were so constrained, however, Plaintiff's suit does not require any complex findings or applications. Plaintiff's claims are not, as Defendant charges, "an attempt to have this court draft and issue a permit which no environmental regulatory agency has heretofore required or been able to prepare." Defendant's Motion to Dismiss, p. 9. Rather, Plaintiff asks only that the Court determine from the evidence that Defendant has discharged stormwater without an NPDES permit. Such a finding would entitle Plaintiff to damages, sanctions, and an injunction, which appears to be all that Plaintiff seeks. Plaintiff does not ask the Court to issue an NPDES permit to Defendant, nor does Plaintiff's desired relief require such. Thus, the Court finds that Plaintiff has standing to bring its citizen suit against Defendant.

3. Primary Jurisdiction.

Defendant asserts that the EPD has primary jurisdiction over Plaintiff's claim, and, therefore, that the Court should refer Plaintiff's suit to the EPD. Defendant's Motion to Dismiss, p. 10. The primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956). The doctrine "comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." Id. at 64. Generally, a court should suspend the judicial process and refer certain issues to an administrative body where resolution of the issues would benefit from the agency's "expertise and specialized knowledge." Id.; Taffet v. Southern Co., 930 F.2d 847, 854 (11th Cir. 1991); Feldspar Trucking Co. v. Greater Atlanta Shippers Assoc., 683 F. Supp. 1375, 1377 (N.D. Ga. 1987) (Freeman, J.). A court should also invoke the primary jurisdiction doctrine when doing so "will promote doing so "will promote . . . . uniformity in a highly regulated area." Western Pac., 352 U.S. at 64; Taffet, 930 F.2d at 854; Feldspar, 683 F. Supp. at 1377.

Defendant claims that invocation of the primary jurisdiction doctrine is appropriate here because to properly resolve Plaintiff's claims, the Court will have to step into the EPD's shoes and fashion a permit for Defendant. See also Defendant's Motion to Dissolve, p. 15. This is not so. Plaintiff is not asking the Court to make any determinations that would benefit from the EPD's expert analysis, or that would be mooted by the EPD's eventual issuance of an NPDES stormwater permit. Plaintiff asks merely that the Court

determine from the evidence that the CWA permits no stormwater discharges without a permit, that Defendant has discharged stormwater, and that Defendant does not have a permit. The CWA already sets out all of the relevant standards for the Court to consider, and determination of the facts and their application to those standards require absolutely no administrative expertise. Therefore, the Court finds that Plaintiff's claim is not appropriate for referral to the EPD's primary jurisdiction. Compare Feldspar, 683 F. Supp. at 1377.

4. Indispensable Party.

Defendant contends that Plaintiff has failed to join, and is incapable of joining, an indispensable party, namely the State of Georgia. Therefore, Defendant asserts, Plaintiff's claim is unlikely to prevail on the merits. Defendant's Motion to Dismiss, pp. 11-12. Federal Rule of Civil Procedure 19(a) instructs that a person is an indispensable party, and, therefore, must be joined, if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Federal Rule of Civil Procedure 12(b)(7), in turn, permits courts to dismiss complaints for failure to join an indispensable party under Rule 19(a).

Defendant argues that Plaintiff is seeking to compel it to obtain an NPDES stormwater permit, and that such relief would adversely impact the EPD's ability to implement a uniform administration of water quality laws. Defendant cites Georgia Environ. Project v. Atlanta, No. 90-345 (N.D. Ga. March 22, 1991) (Moye, J.) ("GEP I") as support for its contention that Plaintiff is actually trying to force EPD to take action, thus making the EPD an indispensable party.

In GEP I, the plaintiff sued the defendant for discharging untreated sewage without an NPDES permit. Id. at 1-2. The CWA required an NPDES permit to discharge untreated sewage, but under the Georgia Water Quality Act, pursuant to which the CWA is implemented in Georgia, the defendant was not required to have a permit until March 31, 1991. Id. at 4. This GWQCA provision was approved by the EPA. Id. at 5. The court found that the plaintiff's suit was, by necessity, an attempt to render the GWQCA, and the EPA's approval of it ineffective. Id. Therefore, the court concluded, the EPD and the EPA had an interest in defending the GWQCA provision from Plaintiff's attack. Id. The court held that the EPD and the EPA were indispensable parties, because plaintiff was attempting "to enjoin further CSO discharges and impose penalties for past [] discharges, even though Georgia law does not require permits . . . until March 31, 1991. Id. (emphasis added).

In the instant suit, Georgia law does not claim to immunize Defendant from the need to obtain an NPDES permit before discharging stormwater. A finding by the Court that Defendant is in violation of the CWA and liable to injunction

and penalties would not have the incidental effect of rendering the GWQCA or any other Georgia law ineffective. Nor would it run counter to any past EPA decision. In addition, the relief sought by Plaintiff would not require Defendant to obtain from the EPD an NPDES permit that does not yet exist. It will require only that Defendant obtain an NPDES permit if it intends to continue discharging stormwater. Therefore, neither the EPD nor the EPA is an indispensable party to Plaintiff's suit. In light of the above discussion, the Court denies Defendant's Motion for Summary Judgment.

B. Plaintiff's Motion for a Preliminary Injunction, and Defendant's Motion to Dissolve the TRO.

It is within this Court's sound discretion to grant or deny a preliminary injunction. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983). The Court must consider the following four prerequisites for a preliminary injunction in exercising its discretion:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not serve the public interest.

Id. (citing Canal Authority v. Callaway, 489 F.2d 5671 572 (5th Cir. 1974)).

1. Likelihood of Plaintiff Prevailing on the Merits.

Defendant contends that Plaintiff would be unlikely to prevail on the merits, should this case go to trial, because the

Court would likely find that: (1) the EPD has primary jurisdiction, (2) Plaintiff lacks standing, (3) Plaintiff failed to join an indispensable party, (4) Plaintiff's claim is moot, or (5) the Court should invoke the abstention doctrine. Defendant's Motion to Dissolve, pp. 14-17. The Court has already addressed Defendant's first three assertions. In light of that discussion, the Court finds that, with regard to those three issues, there is a substantial likelihood Plaintiff would prevail on the merits at trial.

a. Mootness.

Defendant asserts that Plaintiff's claim is moot because (1) Plaintiff does not own the "point sources" from which the stormwater is discharged, (2) Plaintiff has obtained and complied with all available permits, and (3) the EPD will soon begin issuing NPDES permits that will cover Defendant's discharges. Defendant's Motion to Dissolve, pp. 10, 14, 16.

Defendant contends that because Gwinnett County accepted Defendant's dedication of the subdivision's roads and stormwater delivery systems prior to any alleged violation, it was the County, and not Defendant, who actually "discharged" the stormwater. Federal regulations governing Georgia's NPDES program provide that "[when a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." 40 CFR § 122.21 (b). At the October 16, 1992 hearing, Mr. Douglas C. Ballard, President of Defendant JMS Development Corporation, testified that a condition of Defendant's conveyance of the stormwater delivery systems to Gwinnett County was that Defendant maintain them for one year. That one year obligation presumably began on August 6, 1992 -the dedication date- and continues to be in effect today. Thus, although Gwinnett County may own the discharge points, Defendant's

continuing obligation to maintain them places upon it the responsibility of obtaining an NPDES permit. Evidence was also presented that stormwater was discharged from a sediment basin owned and operated by Defendant. This sediment basin would likely be deemed a "point source," and, therefore, Defendant, as its owner and operator, would be liable for any discharges made without a permit. See Sierra Club v. Abston Constr. Co., 620 F.2d 41, 45 (5th Cir. 1980) (defining "point source"); 40 CFR § 122.2 (same). Georgia law similarly places on the operator of a point source the responsibility for obtaining a permit. O.C.G.A. § 12-530(a). Thus, under both federal and state law, Defendant is liable for any violative stormwater discharges from these sources.

Defendant is mistaken when it states that it has obtained and complied with all necessary permits. Under federal law, Defendant may not discharge stormwater without an applicable NPDES permit. Defendant does not have such a permit. The acknowledged unavailability of an NPDES stormwater permit in the state of Georgia does not alter this equation. The Clean Water Act establishes an absolute ban absent a permit, and does not make accommodations for a state's refusal to make a permit available. Defendant's possession of a Gwinnett permit pursuant to O.C.G.A. § 127-8 does not absolve it of the obligation to obtain an NPDES permit before discharging stormwater.

Finally, Defendant's assertion that the EPD will soon issue NPDES permits that will cover its discharges is incorrect. As discussed above, neither of the EPD's two proposed NPDES stormwater permits will cover stormwater discharges from construction activities involving land disruption of less than five acres. The testimony before this Court is that Defendant's construction activities involve land disruption of only 4.64

acres. Affidavit of J. Dennis Billew, 14. Thus, even when the EPD issues its NPDES stormwater permits, if they mirror the proposed permits, and if Defendant's activities continue to disrupt only 4.64 acres of land, Defendant will still be unable to acquire a permit to discharge stormwater.[4]

b. Abstention Doctrine.

The EPD, in its Amicus brief, moves the Court to apply the federal abstention doctrine and refuse to grant an injunction. EPD's Amicus Curiae Brief, p. 9. In Burford v. Sun Oil Co., 319 U.S. 315 (1943), the Supreme Court

---

[4]It is regrettable that the EPD has decided to compound the damage its slothfulness has already wrought by neglecting to propose an NPDES permit that will cover stormwater discharges from construction activities involving less than five acres of land disturbance.

The EPD has never been required to wait for the EPA to issue NPDES permits for certain types of discharges before it could develop and issue permits in Georgia for the same types of discharges. Georgia's decision to "largely follow[] the lead of the U.S. EPA in regulating storm water discharges" was made of its own volition. See EPD's Amicus Curiae Brief, p. 6. See also Id. at 4 ("[i]t would be fair to say that, during the 1970's and 80's, the focus of water pollution control efforts both by EPA and by the delegated states was the control through permitting of industrial wastewater discharges and municipal wastewater treatment plant discharges. EPA's intent [and supposedly that of the EPD] was that storm water discharges would eventually be regulated by means of general permits . . . ") (emphasis added); Affidavit of David M. Word, Chief of the Water Protection Branch for the EPD, 17 ("Because [Georgia has regulated stormwater discharges under state law since 1975], it has not been a priority of EPD to create [an NPDES stormwater permitting] program"). Although the argument can be made that limited resources required the EPD to prioritize its tasks, the Department's callous decision to delay issuing NPDES stormwater permits until after the date sanctions became available under the CWA for stormwater discharges without a permit, has stranded Defendant in this essentially no-win position. Unfortunately, because EPD's authority to develop permits is discretionary, even the route of Mandamus is denied to parties in the Defendant's position.

counseled against federal courts exercising their discretionary power where doing so "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814 (1976). In 1989, the Supreme Court described in more succinct form the reach of Burford abstention:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (citation omitted).

Plaintiff asserted at the November 4, 1992 hearing that the Burford doctrine's concern that federal courts not interfere unduly in states' interpretation and application of state laws and regulations is not implicated when the claim involves federal regulatory authority that has been delegated to the states, because the resulting state permit requirements become federal law. This conclusion is not as obvious as Plaintiff contends. See Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd., 453 F. Supp 122, 125-26 (E.D. Va. 1978) (finding

that "the state issuance of NPDES permits does not . . . constitute an act which is federal in nature.").

However, even if the EPD's NPDES permitting scheme is sufficiently non-federal to raise a Burford doctrine question, the determination Plaintiff asks the Court to make here does not warrant exercise of the doctrine. In New Orleans, the Supreme Court found that even if the regulations at issue were non-federal, application of the doctrine was inappropriate because Plaintiff's requested relief required "no inquiry beyond the four corners" of the allegedly state-regulatory decision. 491 U.S. at 350. Such a limited inquiry, the Court found, "would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity." Id. Similarly, Plaintiff's request that the Court determine (1) whether the CWA prohibits stormwater discharge without an NPDES permit, (2) whether Defendant is discharging stormwater, and (3) whether Defendant has an NPDES stormwater permit, do not require interference with, or undue inquiry into, any state law or regulatory scheme. Therefore, the Court finds application of the federal abstention doctrine inappropriate in this case.

2. Threat that Plaintiff Will Suffer Irreparable Injury if the Injunction is Not Granted.

Defendant asserts that Plaintiff's alleged injury is not irreparable because the Court can order Defendant to restore any harm to the Yellow River, and pay damages to Plaintiff. Defendant's Motion to Dissolve, p. 17. Environmental injury is generally considered to be irreparable. See, e.g., Amoco Prod. Co. v. Gambell, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.");

Logan v. Gilmer County, No. 91-147, slip op. at 11 (N.D. Ga. Nov. 13, 1991) ("Monetary damages are not adequate relief for continued discharge of pollutants into United States waters in disregard of federal law and the health and safety of others."); Sierra Club v. Cargill, 732 F. Supp. 1095, 1101 (D. Colo. 1990) (same); United States v. Malibu Beach, Inc., 711 F. Supp. 1301, 1312-13 (D.N.J. 1989) ("Equitable relief is appropriate here because there is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into waters of the United States.").

Dr. Wade Nutter, a Professor of Hydrology at the University of Georgia, testified that he inspected the stream bed near the discharge point and found "about six inches" of sediment had been deposited there. Testimony of Wade Nutter, October 16, 1992, p. 10. Dr. Nutter also testified that whereas the original stream bottom contained organic matter, the deposited sediment did not. Id. In addition, Plaintiff testified at the November 4, 1992 hearing that the sedimentation of the Yellow River due to the stormwater discharge interferes with his ability to use and enjoy the river. The Court concludes that Plaintiff will likely suffer an irreparable injury if an injunction is not issued.

3. Balancing Plaintiff's Alleged Harm Against Defendant's Probable Harm.

Mr. Ballard testified at the October 16, 1992 hearing that if Defendant is enjoined from discharging any stormwater without an NPDES stormwater permit, it will be unable to sell lots on the subdivision or secure any future loans. As a result, Mr. Ballard testified, Defendant may have to file for bankruptcy.

Balanced against this probable harm is the presumption that if environmental harm is sufficiently likely, "the balance

of harms will usually favor the issuance of an injunction to protect the environment." Gambell, 480 U.S. at 545. In addition, compliance with an injunction against discharging stormwater without an NPDES stormwater permit will prevent Defendant's continuing exposure to civil penalties under the CWA of up to $25,000 per day, per violation. See 33 U.S.C. § 1319(d); Logan v. Gilmer County, slip op. at 11. Weighing the parties' potential harms against one another, the Court concludes that the threatened injury to Plaintiff outweighs the threatened harm of an injunction to Defendant.

4. The Public's Interest.

The Court concludes that granting Plaintiff's Motion for a Preliminary Injunction serves the public interest. Congress enacted the CWA's zero-discharge standard and NPDES permit program pursuant to the public's interest in restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. See 33 U.S.C. § 1251(a). This interest is furthered by enforcing the CWA, and alerting tardy agencies of their need to make permits available. See 1972 U.S. Code Cong. & Admin. News 3747 (citizens perform a public service by bringing citizen suits under the CWA). Compare Friends of the Earth v. Carey, 535 F.2d 165, 173 (2d. Cir. 1976) ("the very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.").

Based on the foregone analysis, the Court finds that it is appropriate to issue a preliminary injunction to Defendant. Accordingly, in light of the above discussion, the Court denies Defendant's Motion to Dissolve the TRO.

C. Plaintiff's Motion to Hold Defendant in Contempt of Court.

Plaintiff moves the Court to hold Defendant in Contempt for breaching the Court's August 31, 1992 60-day TRO, and September 11, 1992 60-day extension. Plaintiff's Contempt Motion, p. 1. [13-1]. Parties moving for contempt sanctions bear the initial burden of proof, by Trading Comm'n v. Wellington Precious Metals, Inc., 950 F. 2d 1525, 1529 (11th Cir. 1992). If such a showing is made, the alleged contemnor may defend its failure on the grounds that it was unable to comply, despite making, in good faith, all reasonable efforts to do so. United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).

The Court's TRO restrained Defendant from discharging stormwater from the subdivision without a permit. [5-1]. At the October 16, 1992 hearing, Plaintiff presented clear and convincing evidence that Defendant violated the TRO on September 4, 5, 27, 28, and October 4 and 8, 1992. Plaintiff requests the Court to fine Defendant $25,000 per day of violation, or $150, 000 total. Plaintiff 's Contempt Motion, p. 3.

Despite finding that Defendant violated the TRO, the Court declines to hold it in contempt because, in the Court's opinion, Defendant made, in good faith, all reasonable effort to comply. At the October 16, 1992 hearing, Mr. Douglas C. Ballard testified that Defendant has taken numerous steps to prevent stormwater discharges from the subdivision. See also Affidavit of Douglas C. Ballard, pp. 3-4. According to Mr. Ballard, Defendant has not engaged in any land disturbing activities in the subdivision subsequent to the August 31, 1992

TRO.[5] Mr. Ballard testified also that Defendant had expended more than $30,000 on erosion control, including siltation fences, rock dams, a sediment basin, and sodding. Defendant demonstrated the extent of these efforts at the November 4, 1992 hearing, by entering into evidence a series of photographs displaying the labyrinthical layering of siltation fences it has installed. Defendant's Exhibits, 24, 26, 27, 28, 29 and 30.

Plaintiff counters that the TRO restrained Defendant from discharging any stormwater without a permit, and that Defendant even admits that its prevention efforts were not designed to eliminate all discharges. However, although Defendant was not able to enter into the record any direct evidence that complete elimination of stormwater discharge is impossible, the clear inference from all evidence presented is that full compliance is impossible as a practicable matter.[6] Therefore, the Court denies Plaintiff Is Motion to Hold Defendant in Contempt of Court.

CONCLUSION

The Court DENIES Defendant's Motion to Dissolve the TRO as moot. [14]. The Court DENIES Defendant's Motion to Dismiss, and Defendant's Motion for summary Judgment. [16].

---

[5]Mr. Ballard did testify that land was disturbed after the TRO was issued in order to install various utility components. That work, however, was conducted by government employees, not under Defendant's control, though at Defendant's request in March, 1992, on land to which Gwinnett County had a right of way.

[6]Defendant's counsel asserted at the November 4, 1992, hearing that the only way Defendant could fully comply the TRO would be to construct a moat around its subdivision. The Court is not convinced that even by going to this absurd length Defendant could eliminate all discharges. This Court, therefore, declines to find Defendant in Contempt for failing to prevail over what is, in fact, a Hobson's choice.

The Court GRANTS Plaintiff's Motion for a Preliminary Injunction [18], but DENIES Plaintiff Is Motion to Hold Defendant in Contempt of Court. [13]. Remaining before the Court is Plaintiff's Complaint. [l].

So ORDERED this 9th day of November, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	1:92-cv-2051-RHH
vs.	)	
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
Defendant.	)	

ORDER

Based upon the Order filed contemporaneously herewith respecting Plaintiff's Motion for a Preliminary Injunction; IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

That Defendant, JMS Development Corporation, shall not discharge stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place, without a National Pollutant Discharge Elimination System permit permitting such discharge.

So ORDERED this 9th day of November, 1992.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on the Home Builders Association of Georgia's Motion for Leave to File a Brief as Amicus Curiae [15], and to File a Supplemental Brief as Amicus Curiae [25]. This case is also before the Court on the Georgia Department of Natural Resources, Environmental Protection Division's Motion to File a Brief as Amicus Curiae [19], Defendant's Motion to Amend this Court's November 9, 1992 Order, or, in the alternative, for Relief from the Order [28], and Plaintiff's Motion for Permanent Injunction and for Summary Judgment [30]. The Court GRANTS both of the Home Builders' motions, GRANTS the Georgia Department of Natural Resources' motion, DENIES Defendant's motion, and DENIES Plaintiff's motion.

BACKGROUND

I. Procedural History.

Defendant, JMS Development Corporation, is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place ("the subdivision"), in Gwinnett County Georgia. Plaintiff, Terence Hughey, is a resident of Gwinnett County, and owns property in the county, adjacent to the Yellow River, and topographically downhill from the subdivision.

On August 28, 1992, Plaintiff filed suit against Defendant claiming that Defendant was violating the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("the CWA"), by discharging from the subdivision, without a permit, sedimentation collected in rain-water runoff, that travels off of the property, into a stream, and into the Yellow River [1]. Plaintiff requested that the Court enjoin Defendant, and award damages. The Court issued a Temporary Restraining Order on August 31, 1992, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged storm water, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. (13]. On October 15, 1992, Defendant filed a Motion to Dissolve the TRO. (14]. The Court held hearings on October 16 and November 4, 1992, and issued an Order on November 9, 1992 denying Defendant's motion to dissolve the TRO, denying Defendant's motion to dismiss Plaintiff's complaint, granting Plaintiff's motion for a preliminary injunction, and denying Plaintiff's contempt motion. Hughey v. JMS Dev.

Corp., No. 92-2051 (N.D. Ga. Nov. 9, 1992) (hereinafter Hughey).

Defendant filed its Motion to Amend on November 19, 1992, on the basis of recent developments in both the law and the facts of the case. On November 24, 1992, the Court stayed its November 9, 1992 Order [29], but did not rule on Defendant's motion. Since that time, Plaintiff has moved for summary judgment and for issuance of a permanent injunction.

II. Facts.

Defendant's subdivision contains 50 lots for the construction of residential homes. Forty of these lots are currently owned by Defendant. Defendant has sold the remaining ten lots to individuals or builders, some of whom have begun constructing homes thereon. No construction has begun on Defendant's forty lots. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing and grading an area of the property for the construction of three streets, with related curbing, gutters and storm sewers. Defendant alleged that its street construction involved the disturbance of approximately 4.64 acres of land. Defendant's Motion to Dissolve, p. 2 [14]. Plaintiff concedes this fact, but argues that Defendant' s total land disruption involved more than five acres. On August 6, 1992, Defendant dedicated the streets, curbing, gutters and storm sewers to Gwinnett County, and the county accepted same.

On March 31, 1992, prior to commencing its clearing, grubbing and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing activity in the subdivision, and permitting it, under state law, to discharge certain amounts of

storm water[1]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA restricts the concentration of silt that can be discharged in storm water in Georgia. The Act prohibits storm-water discharges that are more than "50 nephelometric turbidity units "NTUs") higher than the turbidity level of the receiving stream immediately upstream from the storm water runoff discharge at the time of such discharge . . .." O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at an October 16, 1992 hearing that Defendant had discharged storm water that was more than fifty-NTUs higher than any background turbidity. See Testimony of Dr. Wade Nutter, pp. 6, 8-32, 35-39; Testimony of Terence Hughey, pp. 8-17, 24, 38-43, 59-61, 83-85, 103.

On November 19, 1992, Defendant first acquired a National Pollutant Discharge Elimination System ("NPDES") storm-water permit, which generally is required in order to exempt oneself from the CWA's federal prohibition on discharging storm water. Defendant's failure to obtain an NPDES permit prior to this date is due, at least in part, to the State of Georgia's failure to make NPDES storm-water permits available to potential applicants (see infra).

---

[1]Under both federal and state law, the term "storm water" is used for water that contains sedimentation from land-disturbing activities.

III. The Clean Water Act, and the NPDES Permitting Program.

In 1972, Congress amended the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." Pub. L. No. 92-500, § 2, 86 Stat. 816 (codified at 33 U.S.C. § 1251(a)). Pursuant to this objective, the Act prohibits the discharge of any pollutants from a "point source,"[2] except in accordance with standards promulgated in permits issued under other sections of the Clean Water Act. § 301(a) (codified at 33 U.S.C. § 1311(a)). The permitting scheme requires that persons seeking to so discharge pollutants must obtain an NPDES permit, either from the Environmental Protection Agency ("the EPA"), or from their state environmental agency if the EPA has delegated authority to the state to issue the permits. § 402 (codified at 33 U.S.C. § 1342).

The Act also authorizes individuals to commence suits on their own behalf ("citizen suits"). § 505(a) (codified at 33 U.S.C. § 1365 (a)). A person may bring a citizen suit against "any person who is alleged to be in violation of an effluent standard or limitation under this chapter . . . ." Id.

On June 28, 1974, the State of Georgia received authority to administer the NPDES program within its borders. Pursuant to this grant of authority, the CWA is now implemented in Georgia by the Georgia Water Quality Control Act ("the GWQCA"), O.C.G.A. § 12-5-20 et seq. Georgia, in turn, has delegated the authority to issue NPDES permits to the

---

[2]The CWA defines "point source" as "any discernible, confined and discreet conveyance, including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." § 502(14) (codified at 33 U.S.C. § 1362 (14)).

Environmental Protection Division of the Georgia Department of Natural Resources ("the EPD"). O.C.G.A. § 12-5-20.

The CWA did not explicitly address storm-water discharges, however, until it was amended in 1987. In that year, Congress enacted the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987) (codified as amended in scattered sections of 3 3 U.S.C.), and created a new regulatory scheme for storm-water discharges. § 402(p) (codified at 33 U.S.C. § 1342(p)). Congress subsequently amended the regulatory scheme in 1991, and again in 1992. Pub. L. No. 102-240, § 1068, 105 Stat. 2007; Pub. L. No. 102-580, § 364, 106 Stat. 4797.

Until October 31, 1992, § 402(p) prohibited the EPA, or states to which NPDES permitting authority had been delegated, from requiring NPDES permits prior to October 1, 1992 for storm-water discharges. § 402(p)(l). The section, however, excepted from this moratorium discharges "associated with industrial activity." § 402 (p)(2)(B). Federal regulations define "storm water discharge associated with industrial activity" as "construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x).

On October 31, 1992, Congress amended section 402(p) to extend, from October 1, 1992 to October 1, 1994, the date upon which dischargers of storm water would be required to obtain NPDES permits. The Water Resources Development Act of 1992, Pub. L. No. 102-580 § 364, 106 Stat. 4797. Congress continued, however, to exempt discharges "associated with industrial activity" from the moratorium. Thus, prior to October 1, 1994, one does not violate the CWA

by discharging storm water without an NPDES permit, so long as the discharge is not associated with industrial activity. However, it has been and continues to be a violation of the CWA to discharge storm water without an NPDES permit if the discharge is associated with construction activity resulting in the disturbance of more than five acres, or the disturbance of less than five acres if those less-than-five-acres are part of a larger common plan of development or sale.

The Water Quality Act also imposed deadlines prior to October 1, 1992 for the EPA, or states with delegated authority, to establish NPDES permit application requirements, and to accept and respond to applications. § 402(p)(4). The EPA failed to comply with these deadlines. Not until September 9, 1992 did the EPA make available a "general NPDES permit" to cover storm-water discharges falling under § 402(p)(2)(B). 57 Fed. Reg. 41,176 - 41,233 (September 9, 1992). The EPD, apparently in an effort "to be consistent with the federal program," has consistently waited until after the EPA has acted before implementing each step of its permit authorization process. See EPD's Amicus Curiae Brief, p. 8.

On November 19, 1992, Defendant obtained an NPDES general permit authorizing Defendant, upon submittal of a Notice of Intent ("NOI"), "to discharge storm water associated with construction activity to the waters of the State of Georgia in accordance with [limitations and conditions set forth in the permit]." Permit, cover page (appended to Defendant's Motion to Amend at Exhibit A-1). That same day, Defendant submitted an NOI to the EPD. Defendant's Motion to Amend, Exhibit B-1.

DISCUSSION

I. Amicus Briefs.

The Court referred to the Home Builders and the Georgia Department of Natural Resources' Amicus briefs in reaching its November 9, 1992 ruling, but neglected to grant the organizations' motions explicitly. The Court grants both organizations, motions for leave to file briefs as Amicus Curiae, and grants the Home Builders' motion to file a supplemental brief.

II. Defendant's Motion to Amend and for Relief.

Defendant moves the Court to amend its November 9, 1992 Order to deny Plaintiff's motion for a preliminary injunction, permanent injunction, and civil penalties, and to grant Defendant's motion for summary judgment. Defendant bases its motion on the following grounds.

A. The Association of Defendant's Discharges with Industrial Activity.

Defendant contends that as a result of the 1992 Act, neither the EPA nor the EPD require NPDES permits for storm-water discharges associated with land disturbance involving less than five acres of land until October 1, 1994. In light of the Court's finding in its November 9, 1992 Order that Defendant's construction activities involved land disruption of less than five acres (i.e., 4.64 acres), Defendant asserts that it is not required to obtain an NPDES permit until October 1, 1994.

As stated above, a storm-water discharger generally need not secure an NPDES permit prior to October 1, 1994 order to discharge storm water and remain in compliance with the CWA. § 402(p)(1). However, if the discharge is

"associated with industrial activity," then it is not covered by the October 1, 1994 moratorium (nor the October 1, 1992 moratorium), and the discharger is in violation of the CWA unless it has an NPDES permit. § 402 (p)(2)(B). Federal regulations define "[s]torm water discharge associated with industrial activity" as: "Construction activity including clearing, grading and excavation activities except; operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale." 40 C.F.R. § 122.26(b)(14)(x) (emphasis added).

In the November 9, 1992 order, this Court stated that the "[e]vidence presented at the October 16, 1992 hearing demonstrates that Defendant's construction activities involved land disruption of less than five acres." Hughey, slip op. at 13. See also Id. at 23 ("The testimony before the Court is that Defendant's construction activities involve land disruption of only 4.64 acres.")

Plaintiff now contends that defendant was in violation of the CWA notwithstanding the 1992 Act's extension of the date by which NPDES permits must be secured. Plaintiffs argue that this is so even if Defendant's construction activities involved land disruption of less than five acres. Because those five acres are "part of a larger common plan of development or sale," Plaintiff argues, Defendant's discharges are "associated with industrial activities," and, thus, not covered by the October 1, 1994, or the previous October 1, 1992 moratoriums. See 40 C.F.R. § 122.26(b)(14)(x). See also Defendant's Statement of Material Facts as to Which There is no Genuine Issue to be Tried, ¶ 1 ("Defendant is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place in Gwinnett County, Georgia (Ballard

affidavit, paragraph 2).") (appended to Defendant's Motion to Dismiss [16]); Testimony of Douglas C. Ballard on October 16, 1992, pp. 23-24 (answering "yes" when asked if his land-disturbing activities were "*conducted by and for JMS* Development Corporation as part of a common plan to develop the entire neighborhood" and whether "that entire neighborhood is in fact approximately 20 acres").

Defendant responds to Plaintiff,' s argument by entering into the record an affidavit of Loomis E. Deavours, Secretary of JMS Development Corporation, in which Deavours states that as of December 31, 1992, Defendant had sold ten lots in the subdivision to various individuals and builders, and that Defendant had "no intention to further develop or engage in land disturbing activities on property [it] owned." Deavours Affidavit, p. 1 (appended to Defendant's Response to Plaintiff's Motion for Summary Judgment at Exhibit D [33]). Deavours also testified that "all future land-disturbing activities will be performed by others on property not under the control of the JMS Development Corporation[, and that e]xcept for minor utility work performed by others, all construction activities by [Defendant] ceased prior to plaintiff filing his complaint." Id. at 1-2. Finally, Deavours testified that although Defendant is the developer of the 19.2 acre subdivision, it "has no 'common' ownership or control over the remaining construction activities occurring at [the] subdivision." Id. at 2.

Defendant also directs the Court's attention to a recent case in which the Ninth Circuit held that the CWA's exemption of construction sites smaller than five acres from the definition of storm-water discharges "associated with industrial activity" is arbitrary and capricious. Natural Resources Defense Council, Inc. v. United States E.P.A., 966 F.2d 1292, 1305-06 (9th Cir. 1992) (hereinafter "N.R.D.C."). The Ninth Circuit did not find

that the EPA' s inclusion of some construction activities within the definition of "industrial activity" was arbitrary and capricious. Rather, the Circuit found that the EPA's establishment of five acres of construction activity as the threshold for industrial activity was arbitrary and capricious. Id. at 1306, 1310. In fact, what the Circuit found to be arbitrary and capricious primarily was the EPA's rationale for increasing the threshold from its proposed level of one acre of land-disturbing construction activity to the eventually-adopted five-acre level. Id. at 1305-06 ("We find the EPA's rationale for increasing the limit from one to five acres inadequate and therefore arbitrary and capricious."). Furthermore, the Circuit explicitly limited its ruling to striking the inclusion of sites five acres or smaller within the moratorium, the Circuit did not strike the exclusion of sites over five acres, or sites part of a larger plan of development or sale from the moratorium. Id. at 1306 ("We thus hold that EPA's choice of a five-acre limit is arbitrary and capricious, [and] invalidate that portion of the rule exempting construction sites of five acres or less from permitting requirements . . . .").

The Court finds that Defendant's discharges were "associated with industrial activity", and, thus, were not covered by the CWA's October 1, 1992 and October 1, 1994 moratoriums. Although Defendant's construction activities involved land disruption of less than five acres (i.e., 4.64 acres), those 4.64 acres are "part of a larger common plan of development or sale." Therefore, the CWA has required, and continues to require Defendant to have an NPDES permit before discharging any storm water.

B. Plaintiff's Compliance With the Sixty-Day Notice Requirement.

Defendant contends that Plaintiff's claim against it was invalid as premature because the CWA does not give courts jurisdiction over a plaintiff's claim unless the plaintiff gave the potential defendant sixty-days notice, following defendant's alleged violation of the CWA, of his intention to file suit. § 505(b). Defendant's argument requires a presumption that Defendant was and is covered by section 402(p)'s moratorium. Because the Court has found that this is not the case, the Court denies Defendant's motion to amend on this ground.

C. Defendant's Acquisition of an NPDES Permit.

Defendant also contends that even if the Court finds that Defendant's storm-water discharges from construction activities involves five or more acres, the November 9, 1992 Order should be amended because on November 19, 1992, Defendant filed a Notice of Intent to obtain, and in fact obtained, an NPDES general permit authorizing such discharges.

Defendant has indeed acquired an NPDES permit for its storm-water discharges. Plaintiff contends, however, that Defendant's NPDES Permit is invalid or inoperable for a variety or reasons. See Plaintiff's Response to Defendant's Motion, pp. 14-18 [31]. At this time, the Court need only focus on one of Plaintiff's proffered reasons: Plaintiff has appealed Defendant's NPDES permit, and by virtue of Georgia Rule and Regulation 391-1-2-.10, the issuance of the permit has been automatically stayed. See Ga. R. & Reg. 391-1-2-.10. See also Plaintiff's Supplemental Filing, and documents included therein [37, 38]; Defendant's Response to Plaintiff's Motion, Exhibit A.

In light of the ambiguous status of Defendant's NPDES permit, the Court finds that Defendant's prior acquisition of the permit is not grounds enough to amend the Court's Order. Furthermore, because the Court has found that Defendant was and is not covered by section 1342(p)'s moratorium, the acquisition of an otherwise valid permit does not fully resolve the issues before this Court.

Based on the above reasoning, the Court denies Defendant's motion to amend its November 9, 1992 Order, and denies Defendant's motion for relief from the Order.

III. Plaintiff's Motion for Summary Judgment and for a Permanent Injunction.

A. Standard of Review for Summary Judgment Motions.

This Court will grant summary judgment when "there is no genuine issue as to any material fact... and the moving party is entitled to judgment as a mater of law." Fed. R. Civ. P. 56(c). In cases such as this where the movant is the plaintiff, that party must demonstrate the absence of an issue of material fact with regard to every element essential to his or her claim. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), cert. denied, 484 U.S. 1066 (1988).[3] The movant's burden is "discharged by showing that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id. However, it is not enough in most situations for the movant merely to point out to the court this absence of evidence. Id. at 323; Clark v. Coats & Clark,

---

[3]In contrast, where the movant is the defendant, that party must demonstrate that the nonmoving party, the plaintiff, lacks evidence to support an essential element of her or his claim. Id.

Inc., 929 F.2d 604, 608 (11th Cir. 1991). Rather, "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

Only after the movant meets its initial burden does any obligation on the part of the nonmovant arise. Id.; 398 U.S. 144, 160 (1970); Clark, 929 F.2d at 608. Nevertheless, once the movant has met this initial burden, the opposing party must present evidence establishing a material issue of fact. Celotex, 477 U.S. at 325. The nonmoving party must go "beyond the pleadings" and present evidence designating "specific facts showing that there is a genuine issue for trial." Id. at 324.

All evidence and factual inferences should be viewed in the light most favorable to the nonmoving party. Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987); Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987). However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original). An issue is not genuine if it is unsupported by evidence or is created by evidence that is "merely colorable" or "not significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248.

B. Application.

Plaintiff contends that he is entitled to summary judgment because there is no genuine issue as to whether Defendant violated the CWA.

In a citizen suit brought pursuant to § 505 of the CWA, a plaintiff must prove that the defendant has discharged pollutants from a point source into waters of the United States, and that the defendant's discharges violated an applicable effluent standard or limitation under the CWA. § 505(a)(1). The term "effluent standard or limitation" includes (at least) section 301's prohibition against any discharges of pollutants without a valid NPDES permit.

This Court has already found that Defendant has discharged pollutants from the subdivision without a permit, and that section 402(p) did not exempt Defendant's discharges from the permitting requirement.

Defendant contends, however, that a genuine issue exists as to whether Plaintiff has suffered any injury in fact, and, therefore, as to whether Plaintiff has standing to assert his claims.[4] In support of its contention, Defendant has entered into the record affidavits of Dirk Van Reenen and Greg Wombough, a principle and employee, respectively, in the engineering firm of Atlanta Testing & Engineering. Wombough states in his affidavit that on November 2, 1992 he obtained three water samples from the Yellow River: One 100 feet upstream of the point at which the tributary stream, which originates near the subdivision, discharges into the Yellow River; one 100 feet downstream of that point; and one farther

---

[4]Defendant challenged Plaintiff's standing previously, but on separate grounds. The Court found that Plaintiff did not lack standing on those grounds. Hughey, slip op. at 13-16.

downstream in front of Plaintiff's property. Wombough Affidavit, pp. 1-2 (appended to Defendant's Response to Plaintiff's Motion for Summary Judgment at Exhibit C [33]). Wombough also states that he collected the samples in sterile plastic bottles, and that it was raining at the time, and had been raining since the day before. Id. at 2.

Van Reenen states that he tested the water samples that Wombough collected for turbidity (i.e., clarity), and that the turbidity upstream of the stream's discharge point was higher than it was at both collection points downstream of the stream's discharge point. Van Reenen Affidavit, pp. 1-2 (appended to Defendant's Response to Plaintiff's Motion at Exhibit B). Van Reenen states further that based on his testing, it is his opinion that the discharges from the tributary creek into the Yellow River "had no adverse effect on the turbidity of the Yellow River." Id. at 2-3. See also Testimony of Van Reenen, pp. 115-125).

The Court finds that there is indeed a genuine issue as to whether Plaintiff has suffered an injury in fact, entitling him to standing before this Court. Although Plaintiff has entered into the record substantial evidence to support his claim, the Court finds that he has not established the absence of any genuine issue of material fact as to his standing. At the two previous hearings, Defendant was unable to present any evidence that during periods of rain, turbidity levels in the Yellow River downstream from where the discharges entered were not increased.[5] As a result, the only evidence before the

---

[5]Defendant attempted to proffer such evidence through Van Reenen's testimony on November 4, 1992, but Van Reenen's testimony on this point was not admitted due to hearsay objections. Testimony of Van Reenen, pp. 122-125.

Court prior to its November 9, 1992 ruling was Plaintiff's photographic and video evidence of the discharges from the subdivision into the stream that travels some 750 to 1000 feet before merging into the Yellow River, and Plaintiff's testimony as to his visual impressions of the stream and the Yellow River's condition during rainfall. See, e.g., Hughey Testimony, pp. 34 (stating that he videotaped the Yellow River at "storm event time[s]"); 78-80 (recounting his visual impressions of the stream and the Yellow River both before and after Defendant began its land-disturbing activities); 90-91 (referring to video tape of the stream as it enters the Yellow River); 112-114 (recounting his visual impressions of the stream and the Yellow River, both during rain and in the absence of rain). See also id. at 35-36 (stating that there are other, unrelated creeks that feed into the Yellow River, and that although he had "checked on those streams," he had not checked "precisely how they would relate and contribute to this problem").

Plaintiff never had water from the Yellow River tested for turbidity. See Hughey Testimony, pp. 103 (answering "no" when asked if he has any scientific measurements taken of the damage to the Yellow River or to the "stream" below a point "just below [where the subdivision's discharge enters the stream]").

Although Defendant entered evidence of measurements only from November 2, 1992, and thus can only suggest conditions on the specific days upon which Plaintiff alleges violations occurred, the Court finds that it is enough to create a genuine issue because Plaintiff's evidence of the condition of the Yellow River (as opposed to the condition of the stream and drainage pipes just below the subdivision) is strictly anecdotal, and much of it is not date specific. The Court, therefore, denies Plaintiff's motion for summary judgment.

For the same reasons as discussed above, the Court denies Plaintiff's motion for issuance of a permanent injunction. In light of the current status of the evidence in this case, the Court will continue to Stay its November 9, 1992 Order.

IV. Relation Between the CWA and the SESCA's Fifty-NTU Limitation.

Defendant has also requested the Court to clarify dicta found in its November 9, 1992 Order concerning whether the term "effluent standard or limitation" found in section 505 of the CWA includes the SESCA's fifty-NTU limitation. See Hughey, slip op. at 7. The Court finds that resolution of this issue is unnecessary to rule upon the parties' pending motions.[6]

---

[6]The Court notes that existing authority from other circuits on this issue is unclear and possibly contradictory. Some courts have found that the term "effluent standards or limitations" found in the CWA's citizen-suit section is defined by section 502(11), which defines the term as "any restriction established by a state or the Administrator on quantities, rates, and concentrations [of pollutants]. [emphasis added]" See, e.g., United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 979 (2nd. Cir. 1984); United States v. Metropolitan Dist. Comm'n, 679 F. Supp. 1154, 1157 (D. Mass. 1988), aff'd, 865 F.2d 2 (1989). Other courts have found that the term "effluent standards or limitations" does not include any state-created laws that are not also included within an NPDES permit. See, e.g., McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1198-2000 (E.D. Cal. 1988); New York v. United States, 620 F. Supp. 374, 383 (E.D.N.Y. 1985). To compound the confusion, some courts have (properly) found that state common-law limitations are not included in the definition; but, in making their rulings, have used broad language which has the apparently unintended affect of also placing state statutory and regulatory limitations within the scope of the announced exclusion. See, e.g., Hooker, 749 F.2d at 979. Finally, the Ninth Circuit has seemingly adopted both approaches, stating in one breath that "effluent limitations may be derived from state water quality standards (i.e., agreeing that the term is

CONCLUSION

The Court GRANTS the Home Builders' Motion for Leave to File a Brief as Amicus Curiae, and GRANTS their Motion to File a Supplemental Brief as Amicus Curiae. The Court also GRANTS the Georgia Department of Natural Resources's Motion to File a Brief as Amicus Curiae. The Court DENIES Defendant's Motion to Amend, or, in the alternative, For Relief, and DENIES Plaintiff's Motion for Permanent Injunction and for Summary Judgment.

So ORDERED this 29th day of March, 1993.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

---

defined by § 502(11)] and may be enforced when included in a discharger's permit." Oregon Natural Resources Council v. United States Forest Service, 834 F.2d 842, 850 (9th Cir. 1987) (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-CV-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This case is before the Court for a determination of whether Plaintiff has standing to assert his claims. The Court finds the Plaintiff does have standing before this Court.

BACKGROUND

I. Procedural History.

Defendant JMS Development Corporation is a Georgia corporation engaged in the development of a 19.2 acre subdivision known as Rivercliff Place ("the subdivision" or "the property") in Gwinnett County, Georgia. Plaintiff Terence Hughey is a resident of Gwinnett County who owns property adjacent to the Yellow River and topographically downhill from the subdivision.

On August 28, 1992, Plaintiff filed suit against Defendant claiming that Defendant was violating the Federal Clean Water Act, 33 U.S.C. § 1251 et seq. ("the CWA"), by

discharging from the subdivision, without a permit, sedimentation collected in rainwater runoff that travels out of the subdivision, into a tributary[1], and into the Yellow River. Plaintiff requested the Court to enjoin Defendant and award damages. The Court issued a temporary restraining order ("TRO") on August 31, 1992, restraining Defendant from "discharging sand, silt, asphalt runoff and other pollutants into any waters of the United States without a permit." [5].

On October 13, 1992, Plaintiff filed a Motion to Hold Defendant in Contempt of Court for having discharged stormwater, in violation of the TRO, on September 4, 5, 27, 28, and October 4, and 8, 1992. Plaintiff's Contempt Motion, pp. 1-2. [13]. On October 15, 1992, Defendant filed a Motion to Dissolve the TRO. [14]. The Court held hearings on October 16 and November 4, 1992, and issued an Order on November 9, 1992, denying Defendant's motion to dissolve the TRO, denying Defendant's motion to dismiss Plaintiff's complaint, granting Plaintiff's motion for a preliminary injunction, and denying Plaintiff's contempt motion. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051 (N.D. Ga. Nov. 9, 1992) ("Hughey I"). Defendant filed a Motion to Amend on November 19, 1992, arguing that recent developments in both the law and the facts of the case entitled it to relief from the Court's Order in Hughey I. On November 24, 1992, the Court stayed its Order in Hughey I [29].

Plaintiff later moved for summary judgment and for issuance of a permanent injunction. The Court denied Plaintiff's motion, finding that although Plaintiff had

---

[1]Throughout this suit's litigation, the parties have referred to the tributary by a number of names, including the "creek" and the "stream." For clarity, the Court will refer to it only as the tributary.

established that Defendant violated the CWA, there was a genuine issue of fact as to whether Plaintiff had standing before this Court. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051 (N.D. Ga. March 29, 1993) ("Hughey II"). The Court subsequently held a hearing on the question of Plaintiff's standing.

II. Facts.

Defendant's subdivision contains fifty lots for the construction of residential homes. Defendant owns some of the lots and has sold others to unrelated parties. In the Spring of 1992, Defendant began its development of the subdivision by clearing, grubbing, and grading an area of the property for the construction of three streets, with related curbing, gutters, and storm sewers. On August 6, 1992, Defendant dedicated the streets, curbing, gutters, and storm sewers to Gwinnett County, and the county accepted them.

On March 31, 1992, prior to commencing its clearing, grubbing, and grading activities, Defendant obtained a Gwinnett County development permit ("Gwinnett permit"), authorizing it to engage in land-disturbing activity in the subdivision, and permitting it, under state law, to discharge certain amounts of stormwater[2]. Gwinnett County issued the Gwinnett permit pursuant to its authority to administer Georgia's Soil Erosion and Sedimentation Control Act of 1975 ("the SESCA") within the physical confines of Gwinnett County. See O.C.G.A. § 12-7-8.

The SESCA limits the concentration of silt that can be discharged in stormwater in Georgia. The Act prohibits

---

[2]Under both federal and state law, the term "stormwater" is used for water that contains sedimentation from land-disturbing activities.

stormwater discharges that are more than "50 nephelometric turbidity units ["NTU's"] higher than the turbidity level of the receiving stream immediately upstream from the stormwater runoff discharge at the time of such discharge . . . ." O.C.G.A. § 12-7-6(18). Plaintiff presented evidence at an October 16, 1992, hearing that Defendant had discharged stormwater that was more than fifty NTU's higher than any background turbidity. See Testimony of Dr. Wade Nutter, pp. 6, 8-32, 35-39; Testimony of Terence Hughey, pp. 8-17, 24, 38-43, 59-61, 83-85, 103.[3]

On November 19, 1992, Defendant first acquired a National Pollutant Discharge Elimination System ("NPDES") stormwater permit, which generally is required in order to exempt oneself from the CWA's prohibition on discharging stormwater. Defendant's failure to obtain an NPDES permit prior to this date is due, at least in part, to the State of Georgia's failure to make NPDES stormwater permits available to potential applicants. On September 24, 1993, however, the Board of Natural Resources for the State of Georgia held that Defendant's NPDES permit was issued in violation of a procedural rule requiring a written response to all public comments on proposed permits, and the Board ordered Defendant to remand the permit. In re The Conservation Society, Inc. and Terence Hughey, Record No. DNR-EPD-WQ-AH 5-92, slip op. at pp. 2, 6, 10, 32 (Sept. 24, 1993).

---

[3]Hereinafter, the Court will cite to Mr. Hughey's testimony at the October 16 and November 4, 1992, hearings as "Hughey Testimony, p. ___" and to any testimony from the June 25, 1993, hearing as "Trial Testimony, p. ___."

DISCUSSION

I. Standard of Review for Determining Standing.

The United States Supreme Court, in Lujan v. Defenders of Wildlife, ___ U.S. ___, 112 S. Ct. 2130 (1992), recently summarized the requirements for standing before a federal court as follows:

> First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision."

Region 8 Forest Service Timber Purchasers Council v. Alcock, 993 F.2d 800, 805 (11th Cir. 1993) (quoting Lujan, 112 S. Ct. at 2136 (citations omitted)). The burden of proving standing is on the plaintiff. Lujan, 112 S. Ct. at 2136 (citations omitted).

A. Injury-in-Fact.

A plaintiff's affected interest need not be large to obtain standing: "An 'identifiable trifle' will suffice." Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3rd Cir. 1990) (quoting United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14, 93 S. Ct. 2405

(1973)), cert. denied, 498 U.S. 1109, 111 S. Ct. 1018 (1991). See also Georgia Envtl. Project, Inc. v. City of Atlanta, Civil Action No. 90-2403, slip op. at 11 (N.D. Ga. June 27, 1991) (Moye, J.) ("GEP I") (mentioning and appearing to follow the "identifiable trifle" standard). Harm to aesthetic and recreational interests is sufficient to confer standing. Sierra Club v. Morton, 405 U.S. 727, 735 (1972). See also Hall County Historical Soc'y, Inc. v. Georgia Dept. of Transp., 447 F. Supp. 741, 747 (N.D. Ga. 1978) (O'Kelley, J.) ("Standing is no longer confined to those who show economic harm, nor is it necessarily to be denied because the alleged injury is commonly shared. [citations omitted]"). The injury, however, must be distinct and palpable rather than abstract, conjectural, or hypothetical. Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315 (1984); S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 758 (11th Cir.), cert. denied, 111 S. Ct. 2274, 2893 (1991).

B. Traceability.

The Third Circuit has explained the burden imposed by Lujan's traceability requirement as follows:

> The requirement that plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs. A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment. The 'fairly traceable' requirement of the [Lujan] test is not equivalent to a requirement of tort causation. . . . In order to

> demonstrate that they are more than 'concerned bystanders,' plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm.

Powell Duffryn, 913 F.2d at 72 (citing Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 75 n.20, 78, 98 S. Ct. 2620 (1978)). The Third Circuit went on to state that this substantial likelihood,

> may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Id. (footnote omitted). The Court notes that the Third Circuit's analysis is in the context of opposing a summary judgment motion, and not in the context of prevailing on the merits.

C. Redressability.

In Powell Duffryn, the Third Circuit stated that an injunction which reduces, but doesn't eliminate, pollution in the nation's waters redresses resulting injuries "at least in part," and the circuit held that "[p]laintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." 913 F.2d at 73. The Third Circuit also stated that, in general, the award of civil penalties redresses resulting injuries because of their deterrent effect on the polluter. Id.

II. Application

A. Injury-in-Fact.

Plaintiff directs the Court's attention to evidence in the record which he contends demonstrates damage to the tributary and the Yellow River and injuries-in-fact to his aesthetic, recreational, and economic interests. Defendant argues that Plaintiff has not incurred a cognizable injury-in-fact for a variety of reasons. Defendant contends that Plaintiff's testimony at the June 25, 1993, hearing contradicts his testimony at deposition and at the October 16 and November 4, 1992, hearings, and is, therefore, not credible and should be ignored. Defendant also argues that Plaintiff has no legal right to use the tributary and has no protectable interest in the tributary. In addition, Defendant argues that Plaintiff has proffered evidence of only one date-specific discharge of stormwater, and that Plaintiff's testimony demonstrates that he was not injured on that day. Defendant argues further that Plaintiff has alleged only subjective injuries which are insufficiently concrete and overly hypothetical. Still further, Defendant argues that Plaintiff has no scientific proof that discharges from the tributary have an effect on the Yellow River. Finally, Defendant argues that Plaintiff is using his CWA suit as a means to continue his general protest of all kinds of development.

The Court will first review Plaintiff's evidence of discharges and evidence of his exposure to the discharges. Plaintiff has testified that he observed stormwater exiting the subdivision and flowing into the tributary on seven different days prior to August 31, 1992 (the date on which the Court issued the TRO). Hughey Testimony, pp. 79-85 (testifying that he observed stormwater discharges on June 8 & 30, 1992, and

commenting on photographs -entered into evidence- taken on those days), 90-96 (testifying that he observed discharges on June 8, 14, 30, July 1, 2, August 13, 16, 1992, and commenting on Plaintiff's Exhibit 25 -a video tape of the discharges); Trial Testimony, pp. 15-23 (same); Plaintiff's Exhibit 25 (video tape of discharges on those dates). Plaintiff has also testified that he observed stormwater exiting the subdivision on six different days subsequent to August 31, 1992. Hughey Testimony, pp. 6-8 (testifying that he observed discharges on Sept. 4, 5, 27, 28, Oct. 4, 8, 1992), 18-28 (commenting on Plaintiff's Exhibit 29 -a video tape of discharges on those dates). See also Trial Testimony, p. 102 (Plaintiff testifying that he filmed discharges on all of the above-mentioned dates). In addition, Plaintiff testified that he has walked the entire length of the tributary, that he has done so with the permission of the person who owns the land surrounding much of the tributary -Mr. Bill Baskin- and that he has observed sedimentation discharge from the subdivision into the tributary. Hughey Testimony, pp. 98, 105-107, 112-115.

Plaintiff offers testimony and video evidence of discharges from the tributary into the Yellow River on June 8, 1992. Hughey Testimony, p. 91 (commenting on the muddy plume exiting the tributary into the Yellow River, as shown in Plaintiff's Exhibit 25); Trial Testimony, p. 16-20 (same); Plaintiff's Exhibit 25 (the video tape showing the plume exiting the tributary into the Yellow River on June 8, 1992). See also Hughey Testimony, p. 113 (testifying generally as to the muddy plume flowing from the tributary into the Yellow River). Plaintiff does not offer any video evidence of muddy water discharging from the tributary into the Yellow River on any other date. Plaintiff testified that he has observed the Yellow River after rainfalls and has noticed that there is a red,

muddy plume where the tributary intersects with the Yellow River. Trial Testimony, pp. 20-22. Plaintiff also testified that, viewing the Yellow River from his house, he could see the same reddish color in the water. Trial Testimony, pp. 22-23.

Plaintiff has also submitted evidence from turbidity tests conducted on water samples which he took in the vicinity of the subdivision. See generally Plaintiff's Exhibit 31; Hughey Testimony, pp. 8-18. Those tests show that water discharged from Defendant's property on those days contained sedimentation, and that on six days the capacity of that stormwater was in excess of fifty NTU'S. However, Plaintiff also testified that he has not taken any scientific measurement of the damage to the Yellow River, nor has he had anyone else do so for him. Hughey Testimony, pp. 103, 111. In fact, the furthest downstream from the subdivision that Plaintiff has had testing performed is just below the point at which the stormwater exits the pipe running under Rivercliff Drive. Hughey Testimony, p. 103. This point, however, appears to be part of the tributary.

In addition, Plaintiff has testified at length on his use and enjoyment of the Yellow River and, to a lesser extent, on his enjoyment of the tributary. He has also testified on how he believes that use and enjoyment has been impaired by Defendant's discharges. See generally Trial Testimony, pp. 5 106. The Court finds that Plaintiff has made a prima facie showing that he has incurred injuries-in-fact, and that those injuries-in-fact are a result of Defendant's discharges of stormwater into the tributary and into the Yellow River.

The Court now addresses Defendant's arguments. The Court finds that when Plaintiff testified at the June 25, 1993, hearing, he contradicted his earlier testimony in only one regard -his use of the Yellow River to irrigate his property.

Plaintiff was asked in his deposition what uses he made of the Yellow River. In response he catalogued a half dozen uses and stated: "I'm sure there are others but I don't recall. They fall in those general categories." Hughey Deposition, pp. 62-63. None of those uses were remotely related to irrigation. Later, at the November 4, 1992, hearing, Plaintiff was asked how he and his family use and enjoy the benefits of the Yellow River. Plaintiff again did not mention irrigation despite being asked twice how he intended to use the river in the future. Hughey Testimony, pp. 72-74.

Other than this contradiction, the Court finds that Plaintiff's testimony is consistent as to alleged injuries in-fact to his aesthetic and, to a lesser extent, his recreational interests. The aesthetic enjoyment he derives from viewing the Yellow River and from his walks along the tributary and the Yellow River has been diminished.[4] The recreational enjoyment he receives from fishing and tubing on, and picnicking along side of, the Yellow River has been diminished.

Plaintiff claims that Defendant violated the CWA and the SESCA by discharging stormwater on the following dates in 1992: June 8, 14, 30; July 1, 2; August 13, 16; September 4, 5, 27, 28; October 4, 8. Plaintiff testified at the June 25, 1993, hearing that on each of those days he saw (and filmed)

---

[4]Defendant challenges this conclusion by citing Plaintiff's testimony at the June 25, 1992, hearing found on page 57 of the transcript. That testimony establishes only that Plaintiff does not walk along or in the Yellow River while it is raining. It is silent as to Plaintiff's walking after the rain has ceased. (See Trial Testimony, p. 103: Plaintiff testifying that "[i]t generally is several days before the river turns back clear"). Defendant also cites to Plaintiff's testimony at the November 4, 1992, hearing on page 114-15 of the transcript. Contrary to Defendant's assertion, that testimony does not establish that Plaintiff walked the tributary only after the development of Rivercliff Place.

stormwater leaving the subdivision. Trial Testimony, p. 102. Plaintiff has supported this testimony with evidence in the form of video tapes, photographs, and/or turbidity testing results. Defendant argues that Plaintiff admitted at the hearings that even had there been no discharge from the subdivision, he would not have utilized the river because it would have been filled with muddy water from other sources. See Trial Testimony, p. 53 (testifying only about tubing the river), 99 (testifying about any use). However, almost immediately after testifying as described above to a question listing a number of different potential uses, Plaintiff asked to change his testimony about walking along the river, stating that he would have walked, but with less enjoyment. Trial Testimony, pp. 99-100. The Court concludes that Plaintiff was sincere in making this change.

Defendant also argues that Plaintiff failed to establish that the discharges on those days actually affected his use and enjoyment of the river. In the testimony which Defendant cites, however, Plaintiff did not state that he would not have used the Yellow River or tributary on the days he filmed. Rather, Plaintiff testified that he filmed the Yellow River and tributary because of his interest in using them. Trial Testimony, p. 59. He also testified that it would have been hard to recreate in, or use the river on, those dates, but he did not state whether his response would have been different had there been no stormwater runoff from the subdivision. Trial Testimony, p. 60-61.

Plaintiff has testified that when it rains, the stormwater which runs off from the subdivision disturbs and diminishes his ability to enjoy the tributary and the Yellow River. He has also testified that the resulting muddy condition remains for as long as a few days to a week after a rainfall. Thus, the period of

time during or immediately after a rainfall is not the only time relevant to his use or enjoyment of the tributary or Yellow River.

Plaintiff has established that his use and enjoyment of the tributary and Yellow River is impaired by stormwater runoff from the subdivision. He has also established that stormwater ran off of the subdivision and into the tributary on the dates listed above. He has further established that stormwater from the subdivision ran into the Yellow River on June 8, 1992. Therefore, absent compelling evidence to the contrary, it is logical to conclude that stormwater runoff on those days diminished his enjoyment of those waterways.

Defendant also argues that Plaintiff's injury and its measurement are entirely subjective. Defendant cites to Plaintiff's testimony from the June 25, 1993, hearing in which Plaintiff stated that his injury results from his visual awareness that the water is "really muddy," and that his awareness of the water's muddiness is based on his own personal qualitative judgment. Plaintiff also testified that some muddiness due to natural sedimentation flow is acceptable. Defendant objects to the prospect that standing and liability can be based entirely on a plaintiff's subjective opinion. Defendant fears that such a standard would make standing meaningless because any subjective opinion would be sufficient to confer standing.

Subjectivity, however, is a natural and necessary method of measuring an injury that may take the form of aesthetic impairment (so long as it is supported with evidence, and so long as the injurious substance or act is such that could realistically injure one's subjective aesthetic sensibilities). The point at which an object disturbs one's sense of aesthetics will differ from person to person. To require a plaintiff to declare an objective, quantifiable point at which an substance or act

becomes aesthetically objectionable would do little to combat subjectivity because the point at which the plaintiff decides to locate that threshold would be determined by the plaintiff's subjective sensibilities. And to require a plaintiff to meet a pre-established objective norm would be to negate aesthetic injury as an element of standing. Without the involvement of individual subjectivity, what is intended to be an analysis of aesthetic injury would become an analysis of whether a pre-established code of conduct was breached.

This acceptance of subjectivity does not, however, emasculate standing, nor does it necessarily open the floodgates of liability. The parsimony of standing and liability are protected in other ways. In the case before this Court, Plaintiff had to establish an actual personal contact with the Yellow River and/or the tributary before the question of his aesthetics even arose. In addition, without a showing that Defendant violated the CWA, Plaintiff's aesthetic judgments could in no way impose liability on Defendant. Finally, Plaintiff's claimed aesthetic impairment must have been of a type that the Court could believe Plaintiff might realistically incur.

Defendant's final argument is that Plaintiff is actually waging an anti-development battle against Gwinnett County and anyone who wishes to develop land near his property. The Court is unconcerned with Plaintiff's alleged ulterior motives. The Court will remain focused on the claims that Plaintiff has made before this Court.

B. Traceability.

In response to Plaintiff's showings regarding the tributary, Defendant argues that Plaintiff admitted that the sedimentation in the tributary could also have come from other

sources. Trial Testimony, p. 37. Even if this is so, Defendant has not offered any evidence to suggest that runoff from the subdivision does not contribute to sedimentation in the tributary. Based on the evidence before it, the Court must conclude that Plaintiff's injury, resulting from sedimentation in the tributary, is fairly traceable, at least in part, to Defendant's discharge of stormwater.

In response to Plaintiff's showing regarding the Yellow River, Defendant contends that Plaintiff cannot show that discharges from the tributary have any connection to injuries which he has sustained. Defendant cites to Plaintiff's testimony that the Yellow River is often muddy after a rainfall and that a number of sources may contribute to the muddy condition of the river. Hughey Testimony, pp. 34-35, 75. Defendant also cites to Plaintiff's admission that sedimentation may enter the tributary from sources other than Defendant's property, Trial Testimony, p. 37, and that the Yellow River above the confluence of the tributary and the river can also have a red, muddy color after rainfall. Trial Testimony, pp. 39, 43-44.

Defendant also presents the Court with evidence in the form of turbidity tests conducted on the Yellow River on four separate occasions. On May 19, 1993, Greg Wombough took water samples, at the instruction of Mr. Dirk Van Reenen, from the Yellow River at three points: One hundred feet above the point at which the tributary converges with the Yellow River (hereinafter referred to as "upstream"); one hundred feet below the point at which the tributary converges with the Yellow River ("downstream"); and at a recreation area one hundred feet downstream from Plaintiff's property ("far downstream"). See generally Trial Testimony, pp. 106-153; Defendant's Exhibit 51. Mr. Wombough testified that it was raining on

three of the four testing days, but that this information comes only from the Atlanta Journal/Constitution newspaper; he could not testify whether it had rained on the subdivision on those days. Trial Testimony, pp. 113 (testifying about November 2, 1993), 113-114, 127-128 (testifying that he obtained his information about rainfall from the Atlanta Journal/Constitution, and that he does not know whether it actually rained on any exposed dirt in the subdivision on any of the testing days), 117-118 (testifying that it had rained on May 19, 1993, but that it was not raining while he took samples), 118-119 (testifying that it was raining on May 25, 1993, during his sampling, although his data sheet suggests only trace amounts of rain that day), 119-120 (testifying that it had rained prior to his taking samples on June 14, 1993).

Turbidity testing of the samples Mr. Wombough collected shows that on two occasions the turbidity upstream was higher than that downstream; on one occasion the turbidity upstream was lower than that downstream; and on one occasion the turbidity was the same at both points. Defendant's Exhibit 51. The testing also shows that on three occasions, the turbidity far downstream was lower than the turbidity upstream, and on two occasions the turbidity far downstream was lower than the turbidity downstream. Defendant's Exhibit 51.[5] Based on this evidence, Defendant's expert witness, Mr.

---

[5]Turbidity testing results:

Sample	Date	Location	Time of Sampling	Turbidity
E	11-2-92	far	8:45 am (approx.)	20
C	"	downstream	9:15 am	NTU's
D	"	upstream	after 8:45 am	25 "
		downstream		18 "

Van Reenen, opined that discharges from the tributary had no adverse effect on the Yellow River. Trial Testimony, pp. 144-145.

Plaintiff takes issue with Defendant's testing evidence on a variety of grounds. First, Plaintiff argues that without any evidence of rainfall on exposed dirt in the subdivision on the testing days, the results are irrelevant to the question whether stormwater discharged from the subdivision inflicts an injury on Plaintiff. Second, Plaintiff argues that because Mr. Wombough took his samples far downstream prior to taking his samples upstream or downstream, the readings do not reflect the turbidity of the "same water." In other words, the water sampled far downstream would have passed the upstream point and the downstream point at least twenty minutes prior to the time at which samples were taken from those two points. In that time, Plaintiff implies, changes in weather patterns or river conditions might have occurred which could have effected the testing results, but which have no bearing on the question whether stormwater discharged from the subdivision traveled

---

1	5-19-93	far	3:45 pm	230 "
2	"	downstream	4:12 pm	290 "
3	"	upstream downstream	4:17 pm	240 "
4	5-25-93	far	7:45 pm	11 "
5	"	downstream	8:05 pm	12 "
6	"	upstream downstream	8:10 pm	13 "
7	6-14-93	far	10:30 am	540 "
8	"	downstream	11:30 am	440 "
9	"	upstream downstream	11:35 am	440 "

past Plaintiff's property. Third, Plaintiff argues that Defendant did not test the water for turbidity prior to November 2, 1993, and that he alleges the dates on which Plaintiff sustained his injuries were all at least one year prior to November 2, 1993. See Trial Testimony, pp. 146-147 (Mr. Van Reenen testifying that, in his opinion, the test results have no bearing on the turbidity readings in the Yellow River on dates other than the dates of the testing).

For the reasons stated by Plaintiff, the Court believes that Defendant's turbidity tests have little bearing on whether Plaintiff incurred injuries, or on whether those injuries are fairly traceable to Defendant's discharges. Accordingly, the Court finds that the injuries Plaintiff sustained due to sedimentation in the tributary are fairly traceable to Defendant's discharges of stormwater in violation of the CWA. As for Plaintiff's injuries because of sedimentation in the Yellow River, the Court finds that the existence of other sources of sedimentation and the presence of sedimentation in the Yellow River upstream of the confluence point of the tributary and the Yellow River does not preclude the Court from finding that Plaintiff could have sustained injuries, or that those injuries are fairly traceable to Defendant's discharges. However, the Court notes that on only one day did Plaintiff video tape any stormwater flow from the tributary into the Yellow River -June 8, 1993- and at no time did Plaintiff video tape or otherwise document any presence in the Yellow River along his property of stormwater which he can show was discharged from the subdivision. With nothing more than Plaintiff's testimony that he believes the offending stormwater in the tributary entered the Yellow River and traveled past his property, the Court cannot find that Plaintiff has met his burden of proof. Therefore, the Court finds that the only injury fairly

traceable to Defendant's discharged stormwater in the Yellow River is that which Plaintiff sustained because of sedimentation flowing from the tributary into the Yellow River on June 8, 1992.

C. Redressability.

Plaintiff contends that an injunction preventing Defendant from discharging stormwater without a permit will eliminate Defendant's contribution to the pollution which is injuring him and, therefore, will redress his injury. Defendant argues that an injunction will not redress Plaintiff's injuries because (1) even if Defendant ceases all stormwater discharges, sedimentation from other sources will continue to make the Yellow River muddy during and after rainfall, and (2) Defendant is no longer conducting land-disturbing activity on its property, so there is no activity to enjoin. The Court finds that Plaintiff's injuries are redressable. Defendant's completion of all land-disturbing activities is irrelevant to this decision, as it is not the activities themselves, but the stormwater discharges related to those activities that cause the injuries. Furthermore, the awarding of civil penalties will deter Defendant and other developers lacking NPDES permits from discharging stormwater into the nation's waters.

D. Prudential Considerations.

Although Plaintiff has satisfied the three-part Lujan test for standing, the Court must determine whether certain prudential considerations disfavor judicial action.

> The Supreme Court has listed three considerations that discourage judicial action despite a party's satisfaction of all three constitutional [standing] requirements:

> (1) assertion of a third party's rights; (2) allegation of a generalized grievance instead of an injury peculiar to the litigant; and (3) assertion of an injury outside the statute's. . . zone of interests.

S.J. Groves & Sons, 920 F.2d at 757 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 474-75, 102 S. Ct. 752, 759-60 (1982)).

Defendant contends that in this case these prudential concerns should convince the Court to find that Plaintiff lacks standing. First, Defendant argues that only the Baskins have a legal right to use or enjoy the tributary, and that Plaintiff's claim, to the extent it is based on stormwater discharges into the tributary, is an assertion of a third party's rights, not his own. Second, Defendant argues that Plaintiff's true grievance is a generalized one against Gwinnett County for its failure to enforce SESCA. Third, Defendant argues that the Court would be more prudent to allow the issues raised here to be addressed through a related administrative proceeding concerning the validity of Defendant's after-acquired NPDES permit. Fourth, Defendant argues that Plaintiff is standing in the shoes of "the enforcement agency," and that because the enforcement agency failed to timely issue an NPDES permit, an action by one standing in the enforcement agency's shoes against Defendant for failing to obtain an NPDES permit violates Defendant's substantive and procedural due process rights.

The Court finds that the prudential considerations raised by Defendant do not support a denial of standing. Regardless of Plaintiff's displeasure with Gwinnett County's enforcement of the SESCA or with the legislative and

administrative branches of government, Plaintiff has plead a cognizable claim against Defendant for injuries which Plaintiff has himself incurred as a result of Defendant's discharges of stormwater. The Court has already found that Plaintiff plead a cognizable and protectable interest in the condition of the tributary, and Plaintiff claims injuries not only because of sedimentation in the tributary, but also because of sedimentation in the Yellow River. In addition, the issues raised in Plaintiff's administrative challenge to the state's NPDES permit are also distinct from the issues raised here. As for Defendant's due process claim, the law is clear that stormwater discharges without an NPDES permit are prohibited. It is Defendant's discharges, and not the State of Georgia's failure to promulgate an NPDES permit in a timely manner, that inflicted the injury.

III. Georgia's Fifty-NTU Limit.

In its March 29, 1993, Order, this Court left unresolved the question of whether SESCA's fifty-NTU limit, established at O.C.G.A. § 12-7-6(18), is enforceable in Plaintiff's citizen's suit under the Clean Water Act. Hughey II, slip op. at p. 22 n.6. The Court believes the answer is no.

33 U.S.C. § 1365 provides that a citizen may bring an action against anyone alleged to be in violation of "an effluent standard or limitation under this chapter . . . ." to 33 U.S.C. § 1365(a)(1)(A). Subsection (f) of section 1365 defines "effluent standard or limitation" as including "an effluent limitation or other limitation under section 1311 or 1312 of this title . . . ." Id. § 1365(f)(2). Section 1311 requires compliance with "any more stringent limitation, including those necessary to meet water quality standards, or schedules of compliance,

established pursuant to any State law or regulations . . . ." Id. § 1311(b)(1)(C) (emphasis added).

Defendant did not have a valid NPDES permit on the dates of his injurious discharges, and does not have a valid NPDES permit now. In fact, it appears that a relevant NPDES permit does not yet exist in the state of Georgia. As explained in earlier Orders, without a valid NPDES permit, Defendant was prohibited, by the Clean Water Act, from discharging any stormwater. As a result, Defendant's limitation on stormwater discharges has been, and continues to be, a complete limitation. Therefore, a limitation of fifty NTU's is not more stringent than the existing limitation.

CONCLUSION

The Court finds that Plaintiff has standing before this Court, as outlined above, to assert his claims against Defendant. The Court will entertain any dispositive motions based on this finding. All motions should be clear as to the precise nature of the desired rulings, and the grounds for such rulings.

So ORDERED this 15th day of December, 1993.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2501-RHH
	)	
JMS DEVELOPMENT	)	
CORPORATION,	)	
	)	
Defendant.	)	

ORDER

This Case is before the Court on Defendant's Motion for Reconsideration [53], Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees [54], and Defendant's Motion for Final Judgment and Assessment of Attorney's Fees [56]. The Court DENIES Defendant's Motion for Reconsideration, GRANTS Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees, and DENIES Defendant's Motion for Final Judgment and Assessment of Attorney's Fees.

BACKGROUND

In an Order dated December 15, 1993, the Court found that Plaintiff has standing to assert his claims against Defendant under the Clean Water Act, 33 U.S.C. § 1251 et seq. (the "CWA"). This finding resolved the only remaining issue preventing a final ruling on Defendant's liability.

DISCUSSION

I. Defendant's Motion for Reconsideration.

In determining that Plaintiff's injuries were fairly traceable to discharges from Defendant's land-disturbing activities, the Court found that Defendant's turbidity tests were of little probative value because, among other reasons, Defendant did not present any evidence of actual rainfall on exposed dirt in the subdivision on the testing days, and the tests were taken approximately one year after Plaintiff incurred the injuries for which the Court found he has standing to sue.

In moving the Court to reconsider its ruling, Defendant directs the Court's attention to evidence of land-disturbing activities in the subdivision on the testing days. Defendant's proffer does not entitle it to a contrary ruling from the Court. First, Defendant's evidence of land-disturbing activity is part of the record of a different case (one brought by Mr. Hughey against another defendant). Defendant has not demonstrated to this Court that this evidence was in the record of this case, and Defendant has not demonstrated that it cited to the evidence in arguing against Plaintiff's standing. Second, Defendant's proffered evidence is probative of land-disturbing activities on the testing days, but is not probative of rainfall on disturbed land on the testing days. Third, even if the Court accepted Defendant's current proffer as evidence of rainfall on disturbed land on the testing days, it has little probative value because the tests were all conducted approximately one year after the dates on which Plaintiff sustained his injuries. The conditions in the subdivision which allowed for storm water discharges in the Summer-Fall of 1992 (the time-frame of Plaintiff's injuries) may have changed significantly by the Summer-Fall 1993 (the time-frame of Defendant's turbidity tests). The Court, therefore, denies Defendant's Motion.

II. Defendant's Motion for Judgment.

Defendant moves the Court to enter final judgment in its favor, arguing that Plaintiff failed to prove that Defendant's violation of the CWA was ongoing and continuous at the time Plaintiff filed his suit. The Supreme Court instructs that a Clean Water Act plaintiff must "allege a state of either continuous or intermittent violation -that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 57, 108 S. Ct. 376 (1987). The Supreme Court also instructs that the mootness doctrine "protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.'" Id. at 66 (citations omitted). The Eleventh Circuit has interpreted this language to mean that a CWA plaintiff can survive a claim of mootness only if, on the date the plaintiff filed its complaint, the defendant continued to be in violation, or there existed a "'continuing likelihood of a recurrence in intermittent or sporadic violations.'" Atlantic States Legal Found. v. Tyson Foods, 897 F.2d 1128, 1134-35 & n. 12 (11th Cir. 1990) (citation omitted). If, after the complaint is filed, the defendant comes into compliance with the Act, the plaintiff's claims for injunctive relief are mooted, but its claims for civil penalties survive. Id. at 1135.

Plaintiff filed his Complaint on August 28, 1992. Plaintiff alleged continuous and ongoing violations and requested injunctive and monetary relief. The Court found, in its December 15, 1993, Order, that Defendant had discharged storm water into the tributary, in violation of the CWA, on 13

dates in 1992 (June 8, 14, 30, July 1, 2, August 13, 16, September 4, 5, 27, 28, October 4, 8), and that Defendant had discharged storm water into the Yellow River, in violation of the CWA, on one date (June 8, 1992)[1]. Hughey v. JMS, Civil Action No. 92-2051, slip op. at 9-10, 13, 15, 22, 27 (N.D. Ga. Dec. 15, 1993) (hereinafter Hughey III). Defendant now appears to argue that the only violations relevant to Plaintiff's suit are those involving discharges into the Yellow River, as opposed to those involving discharges into the tributary. Defendant's Motion, pp. 4-5. Accordingly, Defendant argues that because the Court found Defendant had discharged storm water into the Yellow River only once, and because that one incident occurred prior to Plaintiff filing his Complaint, the Court should dismiss Plaintiff's suit as moot. Id. Defendant, asserting that only this interpretation is consistent with the Court's earlier rulings, argues as follows:

> If Plaintiff's construction is correct, then the June 25, 1993, trial was useless since the Court had previously found that Defendant discharged sedimentation into the tributary. Hughey I [November 9, 1992, Order], p. 30. With regard to Plaintiff's standing, the Court's focus in Hughey II [March 29, 1993, Order] was on the Yellow River. The Court denied Plaintiff's motion for summary judgment on the basis that "Plaintiff's evidence on the condition of the Yellow River (as opposed to the condition of the stream and drainage pipes just below the subdivision) is strictly anecdotal and much of it is not date specific." (Hughey II, p. 21).

---

[1]In its December 15, 1993, Order, the Court mistakenly stated that the date of the established discharge into the Yellow River was June 8, 1993. The actual date was June 8, 1992.

> In Hughey III, this Court did not stop with its analysis of Plaintiff's allegations regarding the tributary, but looked to Plaintiff's proof that the "offending water in the tributary entered the Yellow River and traveled past his property" (Hughey III at 22) and found that Plaintiff only met his burden as to the June 8, 1992, discharge. The only construction consistent with the prior Orders entered by this Court is that Plaintiff has only proved all elements of his case with regard to the June 8, 1992, discharge.

Defendant's Motion, pp. 4-5.

Defendant is correct, to a limited extent, that the Court focused its attention on discharges into the Yellow River in its March 29, 1993, Order (hereinafter Hughey II). The Court did state that Plaintiff's evidence of the condition of the Yellow River on the dates of the alleged violations was anecdotal, in contrast to the evidence of the condition of the tributary. Hughey II at p. 21. However, based on the evidence then before the Court, and on the motions upon which the Court was ruling, the Court's statement was not inconsistent with a then-existing understanding that discharges into the tributary were actionable in and of themselves. As of the date on which the Court issued Hughey II, Plaintiff had established, to a certain extent, his legal interest in the Yellow River, but had not yet established a legal interest in the tributary. Thus, when the question of actual impact on the Yellow River arose, issuance of summary judgment or a permanent injunction became inappropriate. Plaintiff's failure to have established, by that point in the proceedings, an interest in the tributary did not preclude him from presenting at the June 25, 1993, hearing evidence on the matter and establishing such an interest. In

fact, it was precisely because the issue of standing had not been fully developed that the Court convened the hearing. Thus, the Court's language in Hughey II did not preclude Plaintiff from asserting injuries-in-fact based on discharges into the tributary.

The Court also finds that Defendant was aware that Plaintiff's claims were not limited necessarily to discharges into the Yellow River, but could also encompass discharges into the tributary. Defendant's understanding of this point is evidenced by its debating throughout this case the condition of the tributary and arguing at the June 25, 1993, hearing that Plaintiff had no permission to enter the land through which the tributary ran, and, therefore, had not interest in the tributary which Defendant could have injured. For example, in its Trial Brief on Plaintiff's Standing [46] at page 4, Defendant argued that Plaintiff could not establish standing based on discharges into the tributary. Defendant did not base its argument on an assertion that the scope of Plaintiff's claim was limited to discharges into the Yellow River. Instead, Defendant based its argument on the assertion that Plaintiff failed to prove that he had any legal interest in the tributary or in the tributary's condition. Implicit in this argument is the recognition that Plaintiff's claim included the effect of Defendant's discharges on the tributary.

Nonetheless, even if Plaintiff failed to prove that he was injured subsequent to the June 8, 1993, discharge, he has proved that Defendant continued to discharge storm water into waters of the United States (i.e., the tributary) after the date upon which Plaintiff filed his Complaint. This is sufficient to survive a claim of mootness. As the Eleventh Circuit stated in Tyson Foods, a plaintiff's CWA claim is not moot if, on or after the date upon which the plaintiff files its complaint, "the defendants continued to violate [the CWA]." Tyson Foods,

897 F.2d at 1134. Thus, even if Plaintiff's suit was limited to injuries resulting from discharges into the Yellow River (and not the tributary), Plaintiff's claims are not moot because he has presented uncontroverted evidence to the Court that Defendant continued to violate the CWA after Plaintiff filed his suit. The Court has found no authority for the proposition (implied in Defendant's argument) that a CWA plaintiff must also show that the defendant's continued violations continued to injure the plaintiff. The language of Tyson Foods suggests that such a proposition would be incorrect, and this Court finds that proof of standing and proof of continued violations after the complaint is filed is sufficient to defeat a claim of mootness. See Defendant's Motion at p. 5 (arguing that under Tyson Foods, Plaintiff had to prove that "noncompliance was ongoing at the time the suit was filed in order to maintain an action for civil penalties," but stating incorrectly that the Court found, in Hughey III, that Plaintiff did not meet this burden of proof. This Court found only that Plaintiff did not prove discharges into the Yellow River on more than one occasion; the Court clearly found that Defendant continued to discharge storm water into waters of the United States after Plaintiff filed his complaint). See also Tyson Foods, 897 F.2d at 1141 (finding that citizen suits under the CWA for damages do not serve only to compensate a plaintiff for its injury, but also to "punish violators for their non-compliance and to serve the goal of retribution.").

III. Plaintiff's Motion for Final Judgment.

The Court has determined, it its previous Orders, that Plaintiff has standing to maintain his suit, that Defendant has discharged pollutants from a point source into waters of the United States, that Defendant's discharges violated an effluent

standard or limitation under the CWA, and that Defendant's violations are continuing at the time Plaintiff filed suit. Plaintiff, thus, has prevailed on his claim against Defendant under the CWA.

A. Civil Penalties.

Section 309(d) of the CWA authorizes courts to impose civil penalties for violations of the CWA. 33 U.S.C. § 1365(a). The Eleventh Circuit instructs that where a defendant is found to have violated an effluent standard or limitation, the court is required to assess a civil penalty. Tyson Foods, 897 F.2d at 1142.

> In determining the amount of a civil penalty, the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, and good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

In applying the CWA, the Court must first determine the maximum fine for which Defendant may be held liable. Tyson Foods, 897 F.2d at 1137. The Court may then reduce the amount of the civil penalty, but must do so "in accordance with factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." Id. at 1142. Within this framework, the final amount to be assessed is left to the Court's discretion. Id.

1. Maximum Penalty.

The Court finds that Plaintiff has demonstrated discharges from point sources on thirteen days: nine days on which the discharges came from only one point source, four days on which the discharges came from two point sources. This makes for a total of seventeen separate violations, each carrying a maximum civil penalty of $25,000. Thus, the total maximum penalty is $425,000.

2. Seriousness of the Violations.

Plaintiff has shown that Defendant's discharges greatly exceeded the fifty-NTU standard established by the Georgia Soil Erosion and Sedimentation Control Act ("SESCA"). Plaintiff has also shown that the discharged sediment has settled to the bottom of the receiving waters and may have contributed to a decline of aquatic life. Plaintiff has further shown that his aesthetic enjoyment of the water has diminished because of the discharges. The Court notes, however, that Defendant's discharges pose no threat to human health, and that much of the damage will be reversed with the passage of a relatively short amount of time.

3. Economic Benefit Resulting from the Violation.

Plaintiff argues that Defendant could have installed sedimentation control devices which would have prevented storm water discharges, but chose not to incur the expense of doing so. If it was impossible for Defendant to install control devices capable of preventing storm water discharges, then under the CWA, Defendant's only option would have been not to commence any land disturbing activities -meaning no income. Under such a scenario, Defendant would have benefited considerably by violating the CWA rather than remaining in compliance with it. However, if it was possible for Defendant to install control devices capable of preventing

storm water discharges, then the economic benefit of not doing is represented by the additional cost of upgrading the devices to accomplish that task. This cost would have been much smaller than cost of complete abstinence. The Court is willing to accept Plaintiff's argument that Defendant could have installed fully effective devices and procedures. Accordingly, the Court finds that the economic benefit Defendant derived from not upgrading its devices to that level is relative minor.

4. History of Such Violations.

The Court finds that apart from its actions in the Rivercliff subdivision, Defendant has no history of CWA violations.

5. Good-Faith Efforts to Comply with the Applicable Requirements.

Plaintiff claims that Defendant did not undertake good faith efforts to comply with applicable requirements because it did not even attempt to obtain an NPDES permit until approximately six months after it began discharging storm water from the subdivision. Although Defendant did not obtain an NPDES permit, and did not abstain from land disturbing activities while waiting to obtain one, Defendant did employ a series of measures designed to decrease the amount of storm water which is discharged. Those efforts ultimately were not successful and, as a result, Defendant continued to discharge storm water without property authority. But Defendant's efforts do represent a concerted, though insufficient, effort to stem the flow of those discharges.

6. Economic Impact of the Penalty on the Violator.

Plaintiff argues that the Court should determine the value of Defendant's interest in the subdivision and set penalties at a level which, in that context, will constitute more than just a "cost of doing business." Defendant's evidence

shows that although the asking price for all of its lots is approximately $1,400,000, its profit margin is relatively small. the Court will take into consideration the value of Defendant's interests.

7. Final Amount of Civil Penalties.

The Court finds that Plaintiff is entitled to recover from Defendant $500 for each violation of the CWA. This figure is based foremost on the Court's opinion that the seriousness of Defendant's violations was relatively slight, especially when compared to the types of discharges that can warrant maximum penalties (i.e., highly toxic chemicals discharged by the ton). The Court also bases its reduction from the maximum on the fact that Defendant has no evident history of such violations, and that Defendant has demonstrated some good faith effort on comply with the CWA. Finally, the Court finds that the amount of the penalties are appropriate in the context of the subdivision's value and the size of Defendant's economic benefit from having violated the CWA.

B. [No "Section 'B'" found in document]

C. Permanent Injunction.

In opposition to Plaintiff's request for a permanent injunction, Defendant argues that Plaintiff will not suffer irreparable harm, and that there is no likelihood of future violations because it has ceased all land disturbing activities. The Court finds that the probable injuries to Plaintiff's aesthetic and recreational interests from future violations are of an irreparable nature because these interests cannot be compensated fully by future monetary payments. The Court also finds that Defendant need not be actively engaged in the land disturbing activities for its future discharges from land

disturbed by prior activities to constitute a violation. A mere temporal spacing between the land disturbing activities and the storm water discharge from the results of those activities cannot absolve one who still owns the subject land of liability for those discharges. The Court, therefore, orders that Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act.

D. Attorney's Fees.

The CWA authorizes courts to award to a prevailing or substantially prevailing party the costs of litigation, including reasonable attorney and expert witness fees. Id. § 1365(d). The court cannot deny fees and costs absent good cause. Tyson Foods, 897 F.2d at 1142. The Court finds that Plaintiff is entitled to recover his costs of litigation and his attorney's fees reasonably incurred in litigating his claims.

CONCLUSION

The Court DENIES Defendant's Motion for Reconsideration [53], GRANTS Plaintiff's Motion for Entry of Final Judgment and Assessment of Civil Penalties and Attorney's Fees [54], and DENIES Defendant's Motion for Final Judgment and Assessment of Attorney's Fees [56].

The Court ORDERS that Defendant pay to Plaintiff $8,500 in civil penalties and reimburse Plaintiff for his costs of litigation and attorney's fees reasonably incurred in litigating his claims.

The Court also ORDERS that Defendant shall not discharge storm water into the waters of the United States from its development property in Gwinnett County, Georgia, known

as Rivercliff Place if such discharge would be in violation of the Clean Water Act.

So ORDERED this 24th day of February, 1994.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-CV-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on Plaintiff's Motion for Award of Attorneys' Fees and Costs [62] and Attorney Gregory W. Blount's Motion to Withdraw [63]. The Court DEFERS RULING on Plaintiff's Motion for Award of Attorney's Fees and Costs and GRANTS Gregory W. Blount's Motion to Withdraw.

BACKGROUND

On February 24, 1994, the Court ordered that final judgment be entered in this case in favor of Plaintiff in his suit against Defendant pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. (the "CWA"). In that Order, the to recover his fees reasonably Court found that Plaintiff was entitled to recover his costs of litigation and his attorneys' fees reasonably incurred in litigating his claims. Hughey v. JMS Dev. Corp., Civil Action No. 92-2051, slip op. at p. 15 (N.D. Ga. Feb. 24, 1994). Plaintiff has now moved the Court for an award of

attorneys' fees and costs, and Defendant has filed an objection thereto.

DISCUSSION

I. Attorney Gregory W. Blount's Motion to Withdraw.

The Court grants Mr. Blount's Motion to Withdraw as unopposed.

II. Plaintiff's Motion for Award of Attorneys' Fees and Costs.

Defendant filed a Notice of Appeal on March 23, 1994, which the Eleventh Circuit acknowledged on April 22, 1994. Defendant also filed its objections to Plaintiff's Motion for Award of Attorneys' Fees and Costs on April 28, 1994. Plaintiff has moved the Court to award it $114.324 in attorneys' fees, $10,744.23 in expert witness fees, and $5,909-93 in out-of-pocket expenses. Plaintiff's Petition for Award of Statutory Attorneys' Fees and Expenses [67]. Plaintiff has also submitted a bill of costs for $6,270.79. Plaintiff's Bill of Costs [65]. Defendant does not contest the hourly rate at which Plaintiff's attorneys bill their services. Defendant does object to some of the hours billed and contends that Plaintiff's total award should be reduced for less than complete success.

A. Defendant's Specific Objections.

1. Defendant contends that Plaintiff is seeking to recover fees and expenses which were not incurred in the prosecution of his claims against Defendant - Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in successfully challenging the State of Georgia's NPDES general permit. Defendant sought to come under the permit, but was thwarted in its attempt by Plaintiff's

challenge. Plaintiff's challenge, however, was directed not at Defendant's permit per se, but at the legitimacy of the State's issuance of the permits in general. Furthermore, Plaintiff's challenge was not formally a part of the instant litigation. Accordingly, the Court finds that Plaintiff may not recover his attorneys' fees and expenses associated with his challenge of the general permit.

2. Defendant contends that Plaintiff is seeking to recover fees and expenses incurred in pursuing claims against other defendants in other suits. Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in a different suit against other parties involved in construction activities at the Rivercliff Place Subdivision. See Hughey v. Norwest, Civil Action No. 93-165 (N.D. Ga.) (Hall, J.). Defendant was not named in that litigation. The Court finds that Plaintiff may not recover his fees and expenses which were associated with his suit against defendants Norwest, et al., and not associated with the instant suit.

3. Defendant contends that Plaintiff is seeking to recover fees and expenses for multiple attorneys doing the same work. specifically, Defendant objects to instances in which two or three attorneys each reviewed an identical document and then submitted a bill for the time that each of them spent on the review. Defendant also objects to instances in which two or three attorneys conferred on the case and then submitted a bill for the time that each of them spent conferring.

In Norman v. Housing Auth. of City of Montgomery, the Eleventh Circuit instructed that courts should exclude from fee awards reimbursement for redundant hours. 836 F.2d 1292, 1301-02 (11th Cir. 1988). With regard to attorney conferences, the former Fifth Circuit stated:

> if more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a court room or conference, when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974). In a more recent opinion, however, the Eleventh Circuit cited Johnson v. Georgia Highway Express and cautioned that a reduction in a fee award is warranted "only if the attorneys are unreasonable doing the same work." Johnson v. Univ. College of Univ. of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir.) (emphasis in original), cert. denied, 464 U.S. 994 (1983). Rulings by courts in this and other districts indicate that a distinction should be drawn between billings for two different types of "conferences." Where a prevailing party attempts to recover fees for more than one attorney's time expended in conferences with counsel for another party, or with various non-parties, the court should be very hesitant to award fees for more than one attorney, the logic being that, in most cases, one attorney is sufficient to represent a client's interests to outside entities. See, e.g., Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 350 (N.D. Ga. 1992) (Forrester, J.). In contrast, courts should be a little more receptive to billings for more than one

attorney's time expended in conferences with other attorneys representing the same client. The logic here is that the attorneys are developing a strategy, and each attorney involved in representing the client must be aware of, and often involved in creating, the strategy for representing that client. In this latter situation, courts should ensure that the conferences are not too heavily attended or too frequent in number. See, e.g., Mississippi State Chapter Operation PUSH v. Mabus, 788 F. Supp. 1406, 1418 (N.D. Miss. 1992) ("Conferences should be held only when necessary, which should not be very often."); Pierce v. F.R. Tripler & Co., 770 F. Supp. 118, 121-22 (S.D.N.Y. 1991) (finding that "it is not unreasonable to assign -over the course of four years-- different attorneys to the various stages of a case necessitating several briefings and conferences."), aff'd in part on other grounds, 955 F.2d 820 (2d Cir. 1992); Wilder v. Bernstein, 725 F. Supp. 1324, 1337 (S.D.N.Y. 1989) (reducing by twenty percent the amount of a fee request because, among other things, an "excessive amount of time was spent by [counsel] participating in conferences with clients and co-counsel."), rev'd on other grounds, 944 F.2d 1028 (2d Cir. 1991); Skelton v. General Motors Corp., 661 F. Supp. 1368, 1383-84 (N.D. Ill. 1987) (reducing by ten percent the prevailing party's fee request because, although having more than one attorney review documents and attend conferences may be warranted, here there was "some duplication of effort and extensive reviewing and conferring with limited benefit to the [plaintiff] class."), aff'd in part and rev'd in part on other grounds, 860 F.2d 250 (7th Cir. 1988).

After reviewing those billings to which Defendant objects, the Court finds that Plaintiff is entitled to recover on those billings minus $94.50. The Court finds that the conferences were all short in duration, and each corresponded

with a significant filing with or ruling from the Court. It does not appear that these conferences were merely administrative in nature, nor were they obviously unnecessary. The court also finds that the attorneys' reviewings of briefs were generally short in duration. For the most part, those attorneys reviewing briefs and attending conferences were actively involved in each stage of this case. The only exception which this Court has found is a charge for $94.50 attributed to .70 hours of review and conference attendance on January 7, 1993, by Mark Kinzer. The review and conference concerned Defendant's response to Plaintiff's Motion for Summary Judgment, but Mr. Kinzer did not participate in drafting a reply to Defendant's response, so his review of the response and attendance at the conference is unnecessarily duplicative of the two other attorneys, participation. Accordingly, the Court reduces Plaintiff's request by $94.50.

Defendant also seeks reimbursement for three attorneys' time at hearings held on October 16, 1992, and on November 4, 1992. The Court finds that billing for the attendance of three attorneys at these hearings is redundant and excessive. The Court, therefore, deducts from Plaintiff's request the amount requested for the third attorney at those hearings.

4. Defendant contends that Plaintiff is seeking to recover fees and expenses for claims which ultimately were unsuccessful. Specifically, Defendant argues that Plaintiff is trying to recover his fees and expenses incurred in pursuing his unsuccessful motion for contempt against Defendant. The Court finds that Plaintiff may not recover his attorneys' fees and expenses associated with his motion for contempt.

5. Defendant objects to Plaintiff's request to recover fees and expenses for his expert witness on two grounds. First, Defendant argues that Plaintiff did not delineate

the nature of the services rendered by his expert witness. Second, Defendant argues that any billing by the expert witness subsequent to November 4, 1992, should not be reimbursed because after that date the Court did not receive any additional testimony from the witness.

The Court finds that Plaintiff is not entitled to recover any fees and expenses for his expert witness which were incurred subsequent to November 4, 1992. The Court also finds that Plaintiff did not adequately delineate the nature of the services rendered by his expert witness. See Plaintiff's Petition for Award of Statutory Attorneys' Fees and Expenses, Exhibit D. The Court finds that Plaintiff is entitled to recovery only those fees and expenses for his expert witness which are reasonably incurred prior to November 4, 1992, and which are adequately delineated by Plaintiff in a filing with this Court. Plaintiff may delineate the nature of the expert witness, work in his supplemental filing (see below).

6. Defendant objects to the expenses sought in the petition because Plaintiff does not offer an explanation for them. The Court finds that Plaintiff may only recover those expenses which are reasonably incurred and adequately explained. Plaintiff may provide an explanation for them in his supplemental filing (see below).

B. Defendant's General Objection.

As a general matter, Defendant does not dispute that Plaintiff's award request complies with the requirements set forth in Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292 (11th Cir. 1988). Defendant contends, however, that Plaintiff should recover only a percentage of his request because he was not wholly successful in his claims. Specifically, Defendant argues that Plaintiff sought an

injunction enjoining Defendant from further developing the subdivision, but received instead an injunction merely enjoining further violation of the CWA. Defendant also argues that Plaintiff sought hundreds of thousands of dollars in CWA penalties, but was awarded only $8,500. Defendant argues further that because it did not contest the factual underpinnings of Plaintiff's claims, the case was relatively easy litigate. Finally, Defendant argues that Plaintiff seeks to recover for an inordinate amount of associate attorney time spent on researching and briefing issues in the case.

The Court finds that the relatively small size of the CWA penalty awarded to Plaintiff reflects the relative seriousness of Defendant's violation and not the relative merits of Plaintiff's claims. Therefore, the fact that Plaintiff recovered only a fraction of the amount it sought does not diminish the breadth of its victory. The Court also finds that although Defendant did not contest all of the factual underpinnings of Plaintiff's claims, Defendant did mount a spirited defense, and Plaintiff was put to the task of presenting detailed legal and factual arguments. The Court finds further that Plaintiff does not seek to recover for an inordinate amount of associate attorney time. Defendant is correct, however, in arguing that Plaintiff did not secure an injunction against Defendant of quite the scope he had requested. Nonetheless, the Court finds that Plaintiff did secure a meaningful injunction prohibiting future offending actions and did prevail on his underlying claims against Defendant. The Court declines to reduce Plaintiff's award on these general grounds.

C. Discrepancy in Amounts.

Plaintiff informs the Court that his request for an award of attorneys' fees and costs totals $130,978.16. Plaintiff's

Petition for Award of Statutory Attorneys Fees and Expenses, p. 1. Defendant argues that by its calculations, Plaintiff's total request equals only $121,210.88. Defendant's Objection to Plaintiff's Petition, p. 1, n. 1. The Court orders Plaintiff to submit a supplement to its Motion for Award of Attorneys' Fees in which he explains or resolves the discrepancy between his calculation of the amount of his request and Defendant's calculation.

D. Supplement to Plaintiff's Motion.

In order to address and resolve some of the disputes concerning Plaintiff's Petition, the Court orders Plaintiff to file a supplement to its Petition in which he is to do the following:

(1) Explain or resolve the discrepancy between his calculation of the amount of his request and Defendant's calculation;

(2) Deduct from the amount requested his attorneys' fees and expenses associated with his challenge of the general permit;

(3) Deduct from the amount requested his fees and expenses which were associated with his suit against defendants Norwest, et al., but which were not associated with the instant suit;

(4) Deduct from the amount requested the charge for $94.50 attributed to .70 hours of review and conference attendance on January 7, 1993, by Mark Kinzer;

(5) Deduct from the amount requested the fees and expenses associated with a third attorney attending the October 16, 1992, and November 4, 1992, hearings.

(6) Deduct from the amount requested his attorneys' fees and expenses associated with his motion for contempt;

(7) Delineate the nature of his expert witness' work for which he is seeking reimbursement;

(8) Provide a more detailed explanation for the expenses for which he seeks reimbursement.

(9) Provide a final tally of the amount of award to which he is entitled.

Plaintiff's supplement need not be long, overly detailed or overly formalistic. It need only provide a sufficient response to the instructions listed above. Plaintiff is to file its Supplement within ten days of the date of this order. Defendant may file an objection thereto within ten days of receipt of Plaintiff's Supplement.

CONCLUSION

The Court DEFERS RULING on Plaintiff's Motion for Award of Attorneys' Fees and Costs [62] and GRANTS Attorney Gregory W. Blount's Motion to Withdraw [63]. The Court also ORDERS Plaintiff to comply with the instructions contained in this Order.

So ORDERED this 19th day of May, 1994.

[signed]

ROBERT HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This case is before the Court on Plaintiff's Motion for Award of Attorneys Fees and Costs [62]. The Court GRANTS Plaintiff's motion.

In an Order dated May 19, 1994, the Court ordered Plaintiff to supplement his Motion for Award of Attorneys' Fees and Costs to address nine specific issues. Plaintiff has complied with the Order, and the Court finds that Plaintiff is entitled to recover from Defendant $105,992.60 in attorneys' fees, $8,042.16 in expert fees, $4,876.48 in expenses and $6,270.79 in costs.

So ORDERED this 24th day of June, 1994.

[signed]
ROBERT H. HALL
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	1:92-cv-2051-RHH
	:	
JMS DEVELOPMENT CORPORATION,	:	
	:	
Defendant.	:	

JUDGMENT

This action having come before the Court, Robert H. Hall, United States District Judge, for consideration of motion for award of attorneys' fees, and the Court having ruled on same, it is

Ordered and Adjudged that the plaintiff, Terence D. Hughey recover from the defendant, JMS Development Corporation, the sum of $105,992.50 in attorney fees and $8,042.16 in expert fees and $4,876.48 in expenses and $6,270.79 in costs.

Dated at Atlanta, Georgia, this 7th day of July, 1994.

Luther D. Thomas, Clerk

By: [signed]
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
July 8, 1994
Luther D. Thomas, Clerk

By: [signed]
Deputy Clerk

The Plain Dealer
Cleveland, Ohio
June 24, 1969

City Investigating Cause of River Fire

A fire on the Cuyahoga River Sunday which caused $45,000 damage is under investigation by the city's Bureau of Industrial Waste, Utilities Director Ben S. Stefanski II said yesterday.

Stefanski said investigators are attempting to learn what type of combustible substance was dumped into the river and by what company.

"IT PROBABLY HAD to be some kind of gasoline or kerosene," Stefanski said. "The oil that usually gets into the river by dumping or discharge from boats, is of low grade and would be non-inflamable in the water."

Stefanski and Mayor Carl B. Stokes yesterday toured the site of the fire which destroyed two railroad trestles.

A formal complaint to the state government will be filed by the mayor, Stefanski said, because of state licensing for industries along the river to dump pollutants in the river.

"WE HAVE no jurisdiction over what is dumped in there. The state licenses the industries and gives them legal authority to dump in the river. Actually, the state gives them a license to pollute."

Stefanski said his department is compiling a list of industrial offenders along the river to include in the complaint to the state.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:92-cv-2051-RHH
	)	
JMS DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

MOTION OF THE ENVIRONMENTAL PROTECTION DIVISION, GEORGIA DEPARTMENT OF NATURAL RESOURCES TO FILE A BRIEF AS AMICUS CURIAE[1]

....

In 1975, however, the Georgia Assembly enacted the Erosion and Sedimentation Act of 1975, O.C.G.A. Section 12-7-1, et seq. which authorizes the Board of Natural Resources to regulate certain types of land-disturbing activity including many types of building construction. The Act defines land-disturbing activity as "any activity which may result in soil erosion from water or wind and the movement of sediments into state water or onto lands within the state,

---

1 Only relevant portions included.

including, but not limited to, clearing, dredging, grading, excavating, transporting, and filling of land ...." O.C.G.A. Section 12-7-3(8). This Act reflects the Georgia General Assembly's recognition that storm water discharges associated with land-disturbing activities were a significant cause of water quality degradation due to the introduction into the water column of sediments and suspended solids. Although Georgia EPD did not initially address the problem of stormwater discharges through the NPDES program, significant efforts to control storm water runoff have been made through the Erosion and Sedimentation Control Program.

[U.S. EPA Letterhead]

Environmental News

EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT[1]

Thursday, September 3, 1992
Sean McElheney 202-260-1387

In order to control storm water run-off from tens of thousands of facilities in 12 states and 6 territories nationwide, EPA today issued final general permits for storm water discharges associated with industrial activity and new construction. Facilities must submit a short application to EPA by Oct. 1, 1992 to be covered by the permits.

The general permits are National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). EPA is issuing today's general permits specifically for the 12 states and six territories that are not authorized to administer the NPDES program (Alaska, Ariz., Fla, Idaho, La., Maine, Mass., N.H., N.M., Okla., S.D., Texas, American Samoa, District of Columbia, Guam, Northern Mariana Islands, Puerto Rico and the Trust Territory of the Pacific Islands).

Two types of general permits are being issued: one covers construction sites and the other covers all other

---

1 Only relevant portions included.

industrial activity. EPA estimates that over 25,000 industrial facilities and construction sites are eligible for coverage under the general permits in the above states and territories.

Storm water is a leading source of water pollution in the United States, causing an estimated one-third of impaired water quality nationwide. Today's action will improve the quality of the nation's surface waters by reducing pollution from storm sewers and construction sites were land is disturbed.

"Run-off from storm water and other non-point sources is the largest remaining, virtually unaddressed source of water pollution," said LaJuana Wilcher, EPA Assistant Administrator for Water. "Controlling storm water run-off will challenge U.S. industrial facilities to develop new pollution prevention strategies. Yet the payoffs, in improved water quality, will be substantial. Through these permits, we are trying to minimize the burdens while achieving the results we all want," Wilcher said.

[55 Federal Register, 47790 (Nov. 16, 1990]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT APPLICATION REGULATIONS FOR STORM WATER DISCHARGES

Environmental Protection Agency
Final Rule

[text omitted]

I. Background and Water Quality Concerns

The 1972 amendments to the Federal Water Pollution Control Act (referred to as the Clean Water Act or CWA), prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge is authorized by an NPDES permit.

[text omitted]

[60 Federal Register, 62546 (Dec. 6, 1995)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT APPLICATION REQUIREMENTS FOR PUBLICLY OWNED TREATMENT WORKS AND OTHER TREATMENT WORKS TREATING DOMESTIC SEWAGE

Environmental Protection Agency
Proposed Rule

[text omitted]

B. History of the NPDES Permit Program

1. National Pollutant Discharge Elimination System

a. Federal Water Pollution Control Act Amendments of 1972

In response to this dilemma, Congress passed the CWA. Section 402 directed EPA to assume a substantial role in directing and defining the nation's water pollution control programs. The Act established the National Pollutant Discharge Elimination System (NPDES) permit program to be administered by EPA and the States with EPA approval. The NPDES program prohibits the discharge of any pollutant into waters of the United States except when authorized by a permit (sec. 301(a) and 402).

[text omitted]

[60 Federal Register 53529 (Oct. 16, 1995)]

WHOLE EFFLUENT TOXICITY: GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF POLLUTANTS

Environmental Protection Agency
Final Rule

[text omitted]

I. Authority

EPA is promulgating this rule under the authority of sections 301, 304(h), and 501(a) of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. 1251 et seq., 33 U.S.C. 1311, 1314(h), 1361(a). Section 301 of the Act prohibits the discharge of any pollutant into navigable waters unless the discharge complies with certain requirements of the Act, including a requirement for a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to CWA section 402.

[text omitted]

[61 Federal Register 1730 (Jan. 23, 1996)]

GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF OIL AND GREASE AND TOTAL PETROLEUM HYDROCARBONS

Environmental Protection Agency
Proposed Rule

[text omitted]

SUPPLEMENTARY INFORMATION:

1. Authority

A. Clean Water Act

Today's proposal is pursuant to the authority of sections 301, 304(h), and 501(a) of the Clean Water Act (CWA), 33 U.S.C. 1314(h), 1361(a) (the "Act"). Section 301 of the Act prohibits the discharge of any pollutant into navigable waters unless the discharge complies with an NPDES permit, issued under section 402 of the Act.

[text omitted]

Supreme Court, U.S.
FILED
OCT 17 1996
CLERK

No. 96-420

In The

Supreme Court of the United States

October Term, 1996

TERENCE D. HUGHEY,

Petitioner,

vs.

JMS DEVELOPMENT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

RALPH L. TAYLOR, III*
ROBERT JACKSON WILSON
WEBB, TANNER & POWELL
P. O. Box 27
Lawrenceville, Georgia 30246
(770) 963-3423
Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should review the Eleventh Circuit's finding that JMS was not in violation of the Clean Water Act's "no discharge without an NPDES permit" standard with regard to the natural occurrence of stormwater discharge where the facts of the case established (1) compliance with the standard was factually impossible; (2) no NPDES permit covering stormwater discharges existed when JMS conducted its development activity; (3) JMS was in good faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards and (4) the discharges were minimal.

2. Whether this Court should review the Eleventh Circuit's alternative holding that the trial court's injunction barring JMS from discharging stormwater from its residential subdivision "if such discharge would be in violation of the Clean Water Act" failed to meet the requirements of Federal Rule of Procedure 65(d) and failed to contain an operative command as required under prior decisions of this Court.

LIST OF ALL PARTIES

Terence D. Hughey
JMS Development Corporation

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

Statement of the Facts 1

REASONS TO REJECT THE PETITION 7

I. THE ELEVENTH CIRCUIT'S APPLICATION OF THE CLEAN WATER ACT TO THE LIMITED FACTS OF THIS CASE IS IN HARMONY WITH THE INTENT AND PURPOSE OF THE CLEAN WATER ACT AND PRIOR DECISIONS OF THIS COURT 7

II. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH AUTHORITY FROM OTHER CIRCUIT COURTS OF APPEAL 10

III. THE ELEVENTH CIRCUIT CORRECTLY RULED THAT THE TRIAL COURT'S INJUNCTION VIOLATED RULE 65(d) 13

CONCLUSION 14

APPENDIX

1. November 20, 1992 Order ..... App. 1
2. February 25, 1994 Judgment ..... App. 2
3. Affidavit of David M. Word, Chief of the Water Protection Branch of the Georgia EPD ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 9

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2nd Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 62 (1994) 9, 10, 12

Chemical Manufacturer's Association v. NRDC, 470 U.S. 116 (1985) 9

Concerned Area Residents for the Environment v. Southview Farm, et al., 34 F.3d 114 (2nd Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1793 (1994) 10

EPA v. State Water Resources Control Board, 426 U.S. 200 (1976) 8

Epstein Family Partnership v. K Mart Corp., 13 F.3d 762 (3rd Cir. 1994) 14

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), reh'g denied, 89 F.3d 857 (11th Cir. June 17, 1996) 5, 8, 13, 14

Longshoremen's Assn. v. Maine Trade Assn., 389 U.S. 64 (1967) 14

Menzel v. County Utilities Corp., 712 F.2d 91 (4th Cir. 1983) 10, 12

National Wildlife Federation v. Gorusch, 693 F.2d 156 (D.C. Cir. 1982) 12

Natural Resources Defense Council v. EPA, 966 F.2d 1292 (9th Cir. 1992) 3

Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995) 12

TABLE OF AUTHORITIES – Continued

Page

Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir.), cert. denied, 439 U.S. 835 (1974)..... 14

Perry v. Commerce Loan Co., 383 U.S. 392 (1966)..... 8

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), petition for cert. filed, 64 U.S.L.W. 3780 (U.S. May 10, 1996) 10, 11, 12

U.S. v. Frezzo Brothers, Inc., et al., 602 F.2d 1123 (3rd Cir. 1979)..... 10

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)....7, 9

STATUTES

33 U.S.C. §1342(p) 3

33 U.S.C. §1342(p)(1)..... 3

33 U.S.C. §1342(p)(2)(B)..... 3

Ga. Code Ann. §12-7-1, et seq..... 7

RULES AND REGULATIONS

Fed. Rule of Civil Proc. 65.....13, 14

Ga. R. & Reg. 391-1-2-.10 4

40 C.F.R. 122.26(b)(14)(x)..... 4

57 F.R. 11,394..... 3

STATEMENT OF THE CASE

Statement of the Facts

The Respondent in this case is a closely held Georgia corporation known as JMS Development Corporation ("JMS"). In 1991, JMS purchased a 19.2-acre tract of land in Gwinnett County, Georgia, for development as a residential subdivision. (R2-16-24).

Petitioner Terence D. Hughey is a Gwinnett County resident who opposed the development of the subdivision from its inception. In January 1992, Petitioner filed suit against JMS and Gwinnett County in the Superior Court of Gwinnett County. (R12-84, 85, 86). Although Petitioner did not live in close proximity to the proposed subdivision, Petitioner alleged that the subdivision would result in increased traffic and noise and sought to overturn JMS' zoning and to enjoin the development. (R12-86). The Superior Court dismissed Petitioner's complaint.

JMS sought and obtained all permits available from and required by Gwinnett County for the development of the property as a residential subdivision. (R2-16-25). As part of this process, JMS submitted a comprehensive soil and erosion control plan which was approved by Gwinnett County. On March 31, 1992, JMS obtained a Gwinnett County development permit which met the land-disturbing activity and stormwater discharge requirements for Gwinnett County[1] and the State of Georgia. (R2-16-25).

---

[1] Gwinnett County has the authority to administer Georgia's Soil Erosion and Sedimentation Control Act in Gwinnett County.

During late spring and early summer, JMS cleared, graded and grubbed less than five acres of its property for the construction of streets, gutters and storm sewers. (R2-16-25). The company installed state-of-the-art erosion and sedimentation control structures, including silt fences, check dams, grassing, sloping and a sediment retention basin, installed at the direction of Gwinnett County and State of Georgia officials. (R2-16-25). JMS finished the subdivision by August and received approval from Gwinnett County to record its final plat on August 6, 1992. (R2-16-25). The plat subdivided the property into 50 lots and named the subdivision Rivercliff Place. With the recording of the plat, JMS dedicated its streets, gutters and storm sewer system to Gwinnett County, and Gwinnett County accepted the dedication. (R2-16-25). As of August 6, 1992, JMS had ceased all land-disturbing activity and was only in the business of selling lots within the subdivision.

From JMS' property, a small, unnamed stream approximately four feet wide originates and trickles off the property, under a road, and across property belonging to third parties. The stream intersects the Yellow River approximately 840 feet from the JMS property. (R11-46). At the point of confluence of the stream and the Yellow River, the Yellow River is approximately 75 feet wide. (R12-146, 147). Petitioner resides on property located some 2,800 feet downstream from the intersection of the stream with the Yellow River. (R11-46).

On August 28, 1992, Petitioner filed suit against JMS in the United States District Court for the Northern District of Georgia under the citizen's suit provisions of the Clean Water Act, seeking injunctive relief, penalties and

attorney's fees. In his complaint, Petitioner alleged that JMS was in violation of the Clean Water Act for discharging stormwater into waters of the United States without an NPDES permit.

As of March 31, 1992, the date on which JMS was issued a development permit from Gwinnett County, there was no NPDES permit available in Georgia for stormwater discharge associated with development activity. Since June 28, 1974, Georgia's Environmental Protection Division ("EPD") has administered the NPDES permitting program in the State of Georgia with authority from the EPA. The EPD's approach to the permitting scheme for stormwater discharges was to follow the lead of the EPA.[2] As of March 31, 1992, EPA had not promulgated a permit for stormwater discharges associated with industrial activity.[3] In the interim, EPD regulated

---

[2] The Affidavit of David M. Word, Chief of the Water Protection Branch of the Georgia Environmental Protection Division is reprinted in the Appendix, A. 3 (R2-16-30).

[3] Stormwater discharges did not come under the Clean Water Act until 1987, when Congress adopted a complex "phased-in approach" establishing various classifications of discharges and timetables by which NPDES permits were to be promulgated. 33 U.S.C. §1342(p). The Act established a moratorium until October 1, 1992, on the permit requirement for most stormwater permits. Stormwater discharges associated with industrial activity, however, were not subject to the moratorium. 33 U.S.C. §1342(p)(2)(B). EPA extended the statutory deadline for the promulgation of permits for discharges associated with industrial activity to October 1, 1992. 57 F.R. 11,394. On June 4, 1992, the Ninth Circuit struck down the extension. *Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992). On October 31, 1992, the moratorium was extended to October 1, 1994. 33 U.S.C. §1342(p)(1).

stormwater discharge from construction activity through Georgia's Erosion and Sedimentation Control Act, which was administered in Gwinnett County through the issuance of development permits. (A. 6; see fn.1). On September 3, 1992, EPA issued a general permit for discharges associated with industrial activity, which required applicants to submit their requests by October 1, 1992. Georgia's EPD published on September 23, 1992, a notice of intent to issue two general permits, one of which would apply to construction activities. On September 28, 1992, JMS filed a notice of intent with the EPD to come under the permit for construction activity.

In a separate action, Petitioner appealed the general permit applicable to construction activity. The effect of his appeal under Georgia administrative regulations was to stay the issuance of the permit. Ga. R. & Reg. 391-1-2-.10. Petitioner eventually won the appeal on technical procedural grounds.[4]

Federal regulations define stormwater discharge associated with industrial activity to include "construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale". 40 C.F.R. 122.26 (b)(14)(x). JMS argued on appeal that Congress did not intend its construction activity to constitute industrial activity for purposes of the stormwater discharge permitting program. This issue was not addressed by the Eleventh Circuit in light of its finding that JMS was not in violation of the Clean Water Act.

[4] Petitioner has challenged each NPDES permit applicable to construction activity proposed by the EPD. As of the filing date of the Petition for Certiorari, there was still no permit available in Georgia.

In his petition, Petitioner grossly misstates the evidence before the trial court. Petitioner claims that JMS' discharges "converted a formerly clear running stream . . . into a dead stream" and "choked downstream wetlands." (Pet. for Cert., p. 7, 8). Petitioner asserts that he noticed the discharge of silt into the stream on his "daily walks" in his subdivision. (Pet. for Cert., p. 9). To the contrary, Petitioner admitted that he does not live in or near the subdivision (R12-31, 35); he does not live adjacent to or near the stream (R12-31, 35); he had no knowledge of the condition of the stream prior to his efforts to bring a Clean Water Act case against JMS (R10-115); the stream is on private property and is not accessible to the general public (R11-46); he has never made any use of the stream (R10-106; R12-31).[5] Further, there was no evidence in the record, and no finding by the trial court, that wetlands had been affected or altered by any alleged discharge from the subdivision.

Petitioner further asserts that JMS' discharges "polluted the Yellow River" and "flowed through Petitioner's property." (Pet. for Cert., p. 8). Again, the record is devoid of any such proof. Petitioner failed to introduce any scientific evidence at trial that discharge from the JMS subdivision actually made its way down the unnamed stream to the Yellow River. JMS introduced into evidence water samples of the Yellow River during rainfall events which established that turbidity levels were

---

[5] JMS objected to Petitioner's standing in the trial court and on appeal. The Eleventh Circuit declined to address the issue, in light of its holding that JMS was not in violation of the Act. 78 F.3d at 1533, fn. 13.

lower downstream from the confluence with the stream than above. (Exh. 51). JMS also introduced expert testimony that discharges from the four-foot wide stream would not increase the turbidity of the Yellow River. (R12-145, 146). Petitioner's expert made no scientific investigation into the effect of discharges from the stream into the Yellow River. (R12-78).

Petitioner also misrepresents the course of the proceedings before the District Court. After the Court issued the Temporary Restraining Order on August 31, 1992, the Court extended the restraining order on September 11, 1992, with the consent of JMS. The Court subsequently issued a preliminary injunction on November 9, 1992. Petitioner fails to mention that on November 20, 1992, the Court stayed its November 9, 1992 order indefinitely. (A.1) The District Court did not reinstate injunctive relief until its order dated February 24, 1994 (and accompanying judgment dated February 25, 1994), in which the Court enjoined JMS from discharging stormwater . . . "if such discharge would be in violation of the Clean Water Act." (A.2) It was this final injunctive relief order which was overturned by the Eleventh Circuit's alternative holding.

REASONS TO REJECT THE PETITION

I. THE ELEVENTH CIRCUIT'S APPLICATION OF THE CLEAN WATER ACT TO THE LIMITED FACTS OF THIS CASE IS IN HARMONY WITH THE INTENT AND PURPOSE OF THE CLEAN WATER ACT AND PRIOR DECISIONS OF THIS COURT.

This Court noted in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), "the integrity of the Nation's waters, . . . , not the permit process, is the purpose of the FWPCA." The Eleventh Circuit's decision in the case at bar mirrors this Court's interpretation of the NPDES permitting scheme as applied to the natural occurrence of stormwater discharge. The unique facts presented in the case below resulted in a common sense decision by the Eleventh Circuit, narrowly confined to the specific facts of the case. Thus, this Court should deny the Petition for Certiorari.

The Petitioner sought to hold JMS liable under the Clean Water Act for discharging stormwater from its residential subdivision without an NPDES permit even though the undisputed facts established that (1) Georgia's Environmental Protection Division (EPD) had not promulgated an NPDES permit as of March of 1992, when JMS began its development of the Rivercliff Place subdivision; (2) as of March of 1992, JMS had acquired a development permit from Gwinnett County, Georgia, which authorized JMS to commence its development activity and which was issued in compliance with Georgia's Erosion and Sedimentation Control Act, Ga. Code Ann. §12-7-1 et seq.; (3) the development permit mirrored the requirements of the general NPDES permit issued by

the EPD in September of 1992 and authorized the discharge of stormwater; (4) it was factually impossible to stop the discharge of every particle of stormwater; and (5) the alleged discharges were de minimis.

The Eleventh Circuit limited its opinion to the unique facts presented in this case. The Court's common sense approach began with reliance upon authority of this Court that where the literal or plain meaning of a statute produces absurd or unreasonable results contrary to the purpose of the statute, the Supreme Court has followed the purpose of the statute. 78 F.3d at 1529, citing *Perry v. Commerce Loan Co.*, 383 U.S. 392 (1966). The Eleventh Circuit correctly determined that Petitioner's strict interpretation of the Clean Water Act was unreasonable given the limited facts of this case. The Court distinguished this case from one involving a manufacturing facility "that could abate the discharge of pollutants by ceasing operations" and focused on the fact that due to the natural occurrence of rainfall within the subdivision, it was factually impossible to prevent the discharge of every particle of stormwater during a rainfall event. *Id.* at 1530. Further, this was not a situation where the alleged violator's conduct was not being regulated; Respondent's discharges were regulated by the development permit issued by Gwinnett County, Georgia, which was substantially similar to the NPDES permit promulgated by the EPD.

The Eleventh Circuit's approach is consistent with this Court's interpretation of the purpose of the 1972 Amendment to the Clean Water Act. In *EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976), this Court noted that the NPDES permit "defines, and facilitates

compliance with the enforcement of, a preponderance of a discharger's obligations under the Amendments", *id.* at 205 (holding that federal facilities were not subject to state NPDES permit requirements). In *Chemical Manufacturer's Association v. NRDC*, 470 U.S. 116 (1985), this Court rejected a literal interpretation of §301 (1) of the Act and held that the EPA was not prohibited by §301 from issuing "fundamentally different factor" variances from toxic pollutant effluent limitations. The Court deferred to the EPA's interpretation of the Act, in part, on the Court's observation that the dispute was essentially over the means used by the EPA to achieve the goals of the Act. 470 U.S. at 131. In *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), this Court rejected the Tenth Circuit's interpretation of the Clean Water Act restricting the issuance of an NPDES permit where the receiving body of water was in violation of water quality standards, finding that the Clean Water Act vested in the EPA and the states' broad authority to develop long range, area-wide programs to alleviate and eliminate existing pollution. And, in *Weinberger v. Romero-Barcelo*, supra, this Court rejected a literal interpretation of the injunctive relief provisions of the Clean Water Act, noting that "this is a statute in which Congress envisioned, rather than curtailed, the exercise of discretion." 456 U.S. at 316.

This Court has denied certiorari to review an appellate court's refusal to apply a no discharge standard for discharges not specifically authorized by an NPDES permit. In *Atlantic States Legal Foundation Inc. v. Eastman Kodak Company*, 12 F.3d 353 (2nd Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 62 (1994), the Second Circuit held that the discharge of pollutants not listed in a permit

issued by the state regulatory agency was not unlawful under the Clean Water Act. This Court declined to review the decision.

Like the Second Circuit's decision in *Atlantic States*, the decision at bar represents a well-reasoned opinion, applying the requirements of the Clean Water Act to the narrow facts of this case. Therefore, this Court should deny the Petition for Certiorari.

II. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH AUTHORITY FROM OTHER CIRCUIT COURTS OF APPEAL.

Contrary to Petitioner's argument, no other United States Court of Appeals has found a defendant liable under the Clean Water Act for discharges of stormwater from a residential subdivision where, despite the good faith efforts of the defendant, it was impossible to prevent the discharge in its entirety, and where the defendant possessed a permit issued in compliance with state laws which mirrored the proposed but not yet available NPDES permit. The Petitioner relies upon cases where the alleged discharges could have been stopped by some affirmative act of the defendant: *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), petition for cert. filed, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (discharges of wastewater from oil and gas production); *Concerned Area Residents for the Environment v. Southview Farm, et al.*, 34 F.3d 114 (2nd Cir. 1994) (discharges of liquid manure from dairy farming); *U.S. v. Frezzo Brothers, Inc., et al.*, 602 F.2d 1123 (1979) (criminal prosecution of discharges of liquid manure from mushroom farming); and *Menzel v. County*

Utilities Corp., 712 F.2d 91 (1983) (discharge of treated sewage). No circuit authority is cited by Petitioner involving the natural occurrence of stormwater discharge during a rainfall event.

Because the Eleventh Circuit limited its decision to the unique facts of this case, Petitioner's assertion that this decision is inconsistent with other circuits is unpersuasive. For instance, this case is incomparable with the facts at issue in Petitioner's main case, *Sierra Club v. Cedar Point Oil Co.*, supra. In *Cedar Point Oil*, the Sierra Club challenged an oil driller's discharges of produced water directly into the Galveston Bay without an NPDES permit. Unlike the facts in the case at bar, in *Cedar Point Oil*, the defendant could have installed a system which could have eliminated the discharge. The Court noted that defendant had not acted in good faith in attempting to comply with the Clean Water Act. 73 F.3d at 574. Here, the record established that JMS installed a state-of-the-art soil and erosion control system which complied with state requirements for soil and erosion control; yet due to the natural occurrence of rainfall, it was impossible to prevent the discharge of stormwater in its entirety.

Further, Cedar Point's discharges of oil and gas in its produced water were unpermitted and unregulated by any governmental agency. There was no NPDES permit available from the EPA for defendant's discharges, and the general permit which was eventually issued by the EPA *banned* the discharge of produced water. 73 F.3d at 554. In the case at bar, prior to commencing its development activity, JMS applied for and received a development permit from Gwinnett County which met the requirements of Georgia's Erosion and Sedimentation

Control Act. Under this permit, Respondent was authorized to discharge stormwater. Unlike the facts presented in *Cedar Point Oil*, the development permit possessed by JMS mirrored the requirements of the general permit for construction activity proposed by EPD.

Moreover, other Circuit Courts of Appeal have recognized the complexity of the NPDES permitting scheme and have refused to blindly apply the no discharge standard to produce absurd results. The Fourth Circuit, in *Menzel v. County Utilities Corp.*, 712 F.2d 91 (4th Cir. 1983) refused to impose liability against the defendant for discharging sewage without a permit, where the NPDES permit was stayed by the state court. 712 F.2d at 95. The District of Columbia Circuit reversed the trial court in *National Wildlife Federation v. Gorusch*, 693 F.2d 156 (D.C. Cir. 1982) and rejected the assertion that the EPA has a nondiscretionary duty to require dam operators to apply for NPDES permits for dam-induced water quality changes. Significantly, the D.C. Circuit cited to excerpts of the legislative history which suggested that Congress had doubts about the enforceability of the no-discharge standard. 693 F.2d at 179. The Second Circuit, in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2nd Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 62 (1994), held that the discharge of pollutants not listed in a valid permit was not unlawful, and noted that the appellant's absolute no discharge interpretation of the permitting scheme "stands that scheme on its head." 12 F.3d at 357. The Ninth Circuit, in *Northwest Environmental Advocates v. Portland*, 56 F.3d 979 (9th Cir. 1995) ruled that the

City of Portland was not in violation of the Act by discharging raw sewage from outfall points which were not specifically set forth in the City's permit.

The Eleventh Circuit's common sense approach is consistent with the approach taken by other circuits on related issues. The decision follows the purposes of the Act and avoids the patently unreasonable result promoted by the Defendant. Therefore, the Petition for Certiorari should be denied.

III. THE ELEVENTH CIRCUIT CORRECTLY RULED THAT THE TRIAL COURT'S INJUNCTION VIOLATED RULE 65(d).

In his final argument for certiorari, Petitioner attacks the Eleventh Circuit's alternative holding that the injunctive relief order entered by the trial court was unenforceable due to its failure to identify with sufficient specificity the acts that JMS was required to do or refrain from doing.[6] Contrary to Petitioner's assertion, the injunctive relief order entered by the trial court did not simply direct JMS to cease discharging stormwater without a permit. The order specifically stated:

> Defendant shall not discharge stormwater into the waters of the United States from its development property in Gwinnett County, Georgia, known as Rivercliff Place **if such discharge**

---

[6] As noted by Judge Carnes in his concurrence, the Court's ruling on the injunction is dicta since the Court found that Petitioner was not entitled to any relief whatsoever. 78 F.3d at 1533.

> **would be in violation of the Clean Water Act.** (emphasis added).

The Eleventh Circuit properly recognized that the injunction violated the standards of Rule 65(d) of the Federal Rules of Civil Procedure and failed to contain an "operative command capable of enforcement" as required by this Court. *Longshoremen's Assn. v. Maine Trade Assn.*, 389 U.S. 64 (1967). The Court held that the injunction failed to satisfy two primary functions of Rule 65, namely, (1) to inform parties of what they are called upon to do or refrain from doing by requiring trial courts to identify *exactly* what conduct is proscribed; and (2) to be specific in their terms and to describe in detail the acts to be restrained in order to assist appellate tribunals in assessing the correctness of the judgment below. 78 F.3d at 1531. Injunctions which merely require a party to "obey the law" violate the primary functions of Rule 65(d) and fail to give the restrained party fair notice of what conduct will risk contempt. *Epstein Family Partnership v. K Mart Corp.*, 13 F.3d 762 (3rd Cir. 1994); *Payne v. Travenol Laboratories, Inc.*, 565 F. 2d 895, 897-898 (5th Cir.), *cert. denied*, 439 U.S. 835 (1974). The order failed to satisfy these well-established principles of law and therefore the Eleventh Circuit properly vacated the injunction.

CONCLUSION

The Eleventh Circuit's common sense approach to the limited and unique facts of this case is not contrary to this Court's interpretation of the Clean Water Act, nor inconsistent with rulings of other Circuit Courts of Appeal.

The Court refused Petitioner's efforts to hold JMS to an unjust and impossible standard. Therefore, this Court should deny the Petition for Certiorari.

Respectfully submitted,

RALPH L. TAYLOR, III
Georgia Bar No. 701025

ROBERT JACKSON WILSON
Georgia Bar No. 768990

Attorneys for Respondent

WEBB, TANNER & POWELL
P. O. Box 27
Lawrenceville, Georgia 30246

(770) 963-3423

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY, Plaintiff,	)	1:92-cv-2051-RHH
vs.	)	
JMS DEVELOPMENT CORPORATION, Defendant.	)	

ORDER

(Filed Nov. 24, 1992)

In light of recently enacted federal legislation, this Court hereby STAYS its Preliminary Injunction Order of November 9, 1992, pending further order of the Court.

So ORDERED this 20 day of NOVEMBER, 1992.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Terence D. Hughey	:	
Plaintiff,	:	**CIVIL ACTION NO.**
vs.	:	**1:92-cv-2051-RHH**
JMS Development Corporation	:	
Defendant.	:	

JUDGMENT

This action having come before the court, Honorable Robert H. Hall, United States District Judge, for consideration of plaintiff's motion for consideration of plaintiff's motion for entry of final judgment and assessment of civil penalties and attorney's fees, and the Court having granted the motion, it is

Ordered and Adjudged that the defendant JMS Development Corporation pay to the plaintiff Terence D. Hughey $8,500 in civil penalties and reimburse plaintiff for his costs of litigation and attorney's fees reasonably incurred in litigating his claims.

It is further Ordered and Adjudged that the defendant JMS Development Corporation shall not discharge stormwater into the waters of the United States from its development property in Gwinette County, Georgia, known as Rivercliff Place if such discharge would be in violation of the Clean Water Act.

Dated at Atlanta, Georgia, this 25th day of February, 1994.

Luther D. Thomas, Clerk

By: /s/ Pat Austin
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
February 25, 1994
Luther D. Thomas, Clerk

By: /s/ Pat Austin
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TERENCE D. HUGHEY, Plaintiff, v. JMS DEVELOPMENT CORPORATION, Defendant.	)	CIVIL ACTION NO. 1:92-CV-2051-RHH

AFFIDAVIT OF DAVID M. WORD

(Filed Oct. 15, 1992)

PERSONALLY APPEARED BEFORE THE UNDERSIGNED ATTESTING OFFICER, duly authorized to administer oaths, DAVID M. WORD, who, being duly sworn on oath states that he has personal knowledge of the facts set forth in this affidavit and that he makes this affidavit for use by defendant, JMS Development Corporation, and for all of the purposes authorized by law.

The affiant states on oath:

1) I, David M. Word, am an employee of the Environmental Protection Division, Department of Natural Resources, State of Georgia. I am the Chief of the Water Protection Branch, Environmental Protection Division ("EPD"). In this capacity, I serve as the senior management official for water quality issues at EPD. I have served in this capacity since April, 1990.

2) In my capacity as Chief of the Water Protection Branch, I am familiar with EPD's water quality programs, which include permit issuing authority under delegation from U.S. EPA for National Pollutant Discharge Elimination System ("NPDES") permits in Georgia. EPD has been delegated full authority from the U.S. EPA to implement and enforce this permitting program designed to protect water quality in Georgia. This authority has been vested in EPD since 1974.

3) In order to carry out the agency's responsibilities with regard to storm water runoff, EPD prepared a storm water permitting strategy, which was revised in January, 1992. A true and correct copy of the strategy adopted by EPD is attached hereto as Exhibit "A" and incorporated herein by reference.

4) In order to implement the storm water permitting strategy referenced above, and to meet EPD's responsibilities under the Georgia Water Quality Control Act, a draft general permit for authorization to discharge under the National Pollutant Discharge Elimination System, Storm Water Discharges Associated with Construction Activity, was prepared by EPD. A true and correct of the draft General Permit No. GAR100000 is attached hereto and incorporated herein by reference as Exhibit "B".

5) A Public Notice was prepared by this agency concerning the draft general permit and published on September 23, 1992. A true and correct copy of this Public Notice is attached hereto as Exhibit "C".

6) In order to protect the water quality of the State of Georgia, this agency also enforces the Erosion and Sedimentation Control Act of 1975. This Act requires

permits for certain land-disturbing activities. The permit issuing authority under this Act has been delegated to Gwinnett County, Georgia. The erosion and sedimentation control requirements under this Act substantially meet the requirements proposed by EPD for storm water permitting of discharges associated with construction activity. At the present time, and until the above-referenced general permit becomes effective, EPD regulates storm water discharge from construction activities, such as those engaged in by JMS Development Corporation at Rivercliff Place, through the Erosion and Sedimentation Control Act of 1975.

7) Although the Georgia Water Quality Control Act and its regulations make reference to any discharge of pollutants into waters of the State of Georgia, no NPDES program for issuing NPDES permits has been in place for storm water runoff from construction activities. Because such discharge has been covered by the Soil Erosion and Sedimentation Act of 1975, it has not been a priority of EPD to create such a program. Because of recent changes in federal requirements, EPD has initiated a strategy for permitting storm water runoff and promulgated a proposed general permit to regulate these activities under the NPDES program in Georgia.

8) The NPDES program administered by EPD does not prevent the discharge of all pollutants, but attempts to regulate the concentration of such pollutants. Therefore, the general NPDES permit proposed for storm water runoff from construction activities will not prevent the discharge of all pollutants, but will require permitees to

perform certain erosion and sedimentation control practices, currently required under authority of the Erosion and Sedimentation Control Act of 1975.

9) In Georgia, no individual NPDES storm water discharge permits have been required by EPD or issued by EPD to date. Rather, EPD has undertaken a permitting strategy for storm water runoff which intends to cover all such discharges under a general NPDES permit. The general permit will cover land disturbing activities affecting 5 acres or more of land. This is consistent with the federal requirements.

10) EPD has received applications for individual storm water discharge permits, but the agency is not reviewing these applications until a general rule becomes effective. EPD has received a notice of intent to comply with the general permit from JMS Development Corporation for its subdivision in Gwinnett County, Georgia. No action will be taken on this notice of intent until a general permit becomes effective. Therefore, at this time no further action is required or necessary on the part of JMS Development Corporation to be authorized to discharge storm water into waters of the State of Georgia from the subject property.

11) In addition to a notice of intent, the general permitting requirements will also require a storm water pollution prevention plan to be prepared and implemented by permittees. If the permittee has submitted an erosion and sedimentation control plan, as required by the Georgia Erosion and Sedimentation Control Act of 1975, and such plan has been approved by the appropriate soil and conservation district or an issuing authority

such as Gwinnett County, then the permittee is exempt from preparing a separate storm water pollution prevention plan.

Further, affiant saith not.

/s/ D.M. Word
David M. Word, Affiant

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 8th DAY
OF October, 1992.

/s/ Yolanda Fanning
Notary Public

My Commission Expires:

Notary Public, DeKalb County, Georgia
My Commission Expires Dec. 28, 1993

Georgia Department of Natural Resources
205 Butler Street, S.E., East Floyd Tower,
Atlanta, Georgia 30334
Joe D. Tanner, Commissioner
Harold F. Reheis, Director
Environmental Protection Division

STORM WATER PERMITTING STRATEGY STATE OF GEORGIA

Revised January 1992

I. INTRODUCTION

Section 405 of the Water Quality Act of 1987 amended Section 402 of the Clean Water Act, requiring the Environmental Protection Agency to establish regulations setting forth NPDES permit application requirements for storm water discharges. Storm water is defined as storm water runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges), and drainage related storm events or snow melt. Georgia has been delegated the NPDES permit program and is therefore responsible for implementation of a program to control storm water discharges.

II. OBJECTIVES

1. To develop a realistic and meaningful storm water management program that can be implemented satisfactorily with the resources available to EPD.

2. To comply with the requirements of the Federal Clean Water Act of 1987 through a general permitting program for applicable municipal and industrial categories.

3. To provide guidance and instructions that will assist municipalities and industries to comply with the permit requirements.

4. To issue general permits for:

   Large municipalities by November 16, 1993
   Medium municipalities by May 18, 1994
   Industrial subcategories on a priority basis starting in late 1992, with the construction activity subcategory being first priority.

5. Municipal and Industrial Water Pollution Control Plants which fall into one of the eleven subcategories of industrial activity will be required to apply for the appropriate general permit for storm water.

III. APPLICABILITY

NPDES permit applications for storm water discharges are required for the following:

1. Discharges associated with industrial activity.

2. Discharges from a municipal separate storm sewer system serving a population of 250,000 or more.

3. Discharges from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

4. Discharges for which the State determines that the storm water discharge contributes

to a violation of a Water Quality Standard or is a significant contributor of pollutants.

IV. STATEMENT OF STRATEGY

A. MUNICIPAL

The State of Georgia will require all applicable municipalities to comply with permit application requirements for their municipal separate storm sewers. Municipal separate storm sewers are defined as any conveyance or system of conveyances owned or operated by a local government entity and used for collecting and conveying storm water, which is not part of a Publicly Owned Treatment Works. The Clean Water Act mandates that permits for discharges from municipal separate storm sewers shall require controls to reduce the maximum discharge of pollutants to the maximum extent practical (MEP). The State of Georgia will issue area-wide permits for municipal storm water discharges.

EPD has determined that the following geographic areas contain significant storm water discharges that contribute to violations of Water Quality Standards and therefore must comply with the permit application requirements:

LARGE MUNICIPAL

1. Atlanta Metro

Cobb County
DeKalb County
Clayton County
Fulton County
Gwinnett County

MEDIUM MUNICIPAL

2. Augusta

   Richmond County

3. Macon

   Bibb County

4. Savannah

   Chatham County

5. Columbus

   Muscogee County

B. INDUSTRIAL

Storm water discharge associated with industrial activity is defined as the discharge from any conveyance which is used for collecting and conveying storm water, and which is directly related to manufacturing, processing or materials storage areas. Georgia intends to issue a general permit for each of the following subcategories of industrial activity:

1. Facilities subject to federal effluent limitation guidelines for storm water.

2. Manufacturing Facilities classified as Standard Industrial Classification (SIC) codes 24 (except 2434), 26 (except 265 and 267), 28 (except 283 and 285), 29, 311, 32 (except 323), 33, 3441, and 373 (see attachment for list of SIC codes).

3. Mining and Oil and Gas Operations classified as SIC codes 10-14 including active and

inactive mining and oil and gas operations with contaminated storm water discharges, except for areas of coal mining operations which have been reclaimed and the performance bond has been released by the appropriate SMCRA authority, or non-coal mining operations which have been released from applicable State or Federal reclamation requirements after December 17, 1990.

4. Hazardous waste treatment, storage or disposal facilities.

5. Landfills, land application sites that receive industrial wastes.

6. Recycling facilities, including facilities classified as SIC codes 5015 and 5093.

7. Steam electric power generating facilities, including coal handling sites.

8. Transportation facilities classified as SIC codes 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171 which have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations.

9. Treatment works treating domestic sewage or sewage sludge with a design flow of 1.0 MGD or greater, or which are required to have an approved pretreatment program under 40 CFR Part 403.

10. Construction activity (except for disturbances of less than five acres of total land area which are not part of a larger common plan of development or sale).

11. Other specific facilities where materials are exposed to storm water classified under SIC

codes 20, 21, 22, 23, 2434, 25, 265, 267, 27, 283, 285, 30, 31 (except 311), 323, 34 (except 3441), 35, 36, 37 (except 373), 38, 39, and 4221-25.

The requirement to obtain a storm water discharge permit does not apply to the following:

1. Discharges of storm water runoff from areas separate from the facility's industrial activities, such as office buildings and parking lots, provided the storm water does not commingle with storm water from the facility's manufacturing, processing or materials storage areas.
2. Discharges of uncontaminated storm water runoff from mining, oil, and gas operations.
3. Discharges of agricultural storm water runoff or return flows from irrigated agriculture.
4. Discharges of storm water runoff from other facilities or activities specifically excluded from the NPDES program under 40 CFR Part 122.

V. PERMIT APPLICATION REQUIREMENTS

A. MUNICIPAL

1. EPD will use a two part permit application.
2. Part I of the permit application is intended to provide an adequate basis for identifying sources of pollutants to the municipal storm sewer system, to preliminarily identify discharges, and to formulate a strategy for characterizing the discharges. This will include:

(a) general information regarding the permit applicant,

(b) a description of the existing legal authority of the applicant,

(c) source identification information including historic use of ordinances or other controls,

(d) information on characteristics of the nature of system discharges including any available data (at a minimum), this would include a "field screen" analysis,

(e) a description of existing structural and nonstructural controls to reduce the discharge of pollutants.

3. Part II of the application is designed to supplement information provided in Part I. This will include:

(a) a demonstration that the legal authority of the permit applicant satisfied regulatory criteria,

(b) identify all major outfalls,

(c) quantitative data from screening analyses for detecting illicit discharges and illegal dumping (This includes sampling and monitoring for at least 20 pollutants at 5-10 representative major outfalls),

(d) management program to control the discharge of pollutants,

(e) an assessment of the performance of proposed controls,

(f) a financial analysis estimating the cost to implement the proposed management programs,

(g) a description of the rules and responsibilities of coapplicants.

B. INDUSTRIAL

1. EPD will issue general permits for the industrial subcategories and will not require individual permit applications to be submitted.

2. Individual permit applicants and group permit applications will be accepted by EPD but will not be processed.

3. Since general permits may not be issued by October 1, 1992, applicants for subcategories may file, in lieu of an application, a request to be considered under a general permit. The request should include the following information:

   (a) Name,

   (b) Address and location of discharge(s) if different from address,

   (c) Industrial subcategory and SIC code.

4. Public Notices will be issued by EPD prior to issuance of a general permit in accordance with the applicable regulations.

5. To apply for coverage under a general permit once it has been issued, the applicant shall submit a Notice to Intent (NOI) in lieu of a formal permit application. The exact content of the NOI will be specified in the

general permit. At a minimum, the NOI shall include the following information:

(a) Name, address, industrial subcategory and SIC code,

(b) Location of the discharge(s),

(c) Name of the receiving water(s),

(d) Any existing quantitative data pertinent to the storm water discharge.

6. For industrial and municipal facilities which currently have an NPDES permit or an LAS permit for non-storm water discharges, those facilities meeting the definition of industrial activity will be required to apply for coverage under the general permit for storm water applicable to such facilities. This shall also apply to facilities with existing NPDES permits which currently address storm water through a standard permit boilerplate condition. EPD will notify such facilities when the general permits have been issued.

VI. TIMETABLE

Schedule for implementation of the Storm Water Permitting Strategy

EVENT	DEADLINE DATE
1. Obtain general permitting authority from EPA	January 28, 1991
2. Finalize the Storm Water Permitting Strategy	February 8, 1991

3.	Transmit a copy of the strategy to EPA	February 28, 1991
4.	Inform the public of the Storm Water Strategy through a series of meeting and news releases starting	March 1991
5.	Deadline for Part I application – large municipal systems	November 18, 1991
6.	Identify and prioritize industrial subcategory permits to be issued	March 1992
7.	Deadline for Part I application – medium municipal systems	May 18, 1992
8.	Issue industrial general permits on a priority basis by subcategory beginning	Late 1992
9.	Deadline for Part II application – large municipal systems	November 16, 1992
10.	Deadline for Part II application – medium municipal systems	May 17, 1993
11.	Issue area-wide permits for large municipal systems	November 16, 1993
12.	Issue area-wide permits for medium municipal systems	May 17, 1994

VII. CONCLUSION

The implementation of the storm water permitting program is consistent with the Georgia

Clean Water Strategy adopted by EPD in April 1988. In addition, managing storm water runoff is critical to addressing a large number of stream segments in the State that are partially supporting their designated use.

Through this general permitting approach, best management practices for the control of storm water runoff can become a legally enforceable tool. This effort in conjunction with education of the public will assist the State in the continuing effort to protect water quality.

Attachment

SIC CODES
SPECIFICALLY ADDRESSED
IN STORM WATER REGULATIONS

SIC CODE	DESCRIPTION	SUBCATEGORY
10	Metal Mining	3
12	Coal Mining	3
13	Oil and Gas Extraction	3
14	Mining/quarrying nonmetallic minerals (except fuels)	3
20	Food and kindred products	11
21	Tobacco products	11
22	Textile mill products	11
23	Apparel and other finished products made from fabrics and similar materials	11

24	Lumber and wood products (except furniture)	2
2434	Wood kitchen cabinets	11
25	Furniture and fixtures	11
26	Paper and allied products	2
265	Paperboard containers and boxes	11
267	Converted paper/ paperboard products	11
27	Printing, publishing, and allied industries	11
28	Chemical and allied products	2
283	Drugs	11
285	Paints, varnishes, lacquers, enamels, etc.	11
29	Petroleum refining and related industries	2
30	Rubber and miscellaneous plastic products	11
31	Leather and leather products	11
311	Leather tanning and finishing	2
32	Stone, clay, glass, concrete products	2
323	Glass products made of purchased glass	11
33	Primary Metal industries	2
34	Fabricated metal products, machinery and transportation equipment	11
3441	Fabricated structural metal	2
35	Industrial and commercial machinery and computer equipment	11

36	Electronic and other electrical equipment components	11
37	Transportation equipment	11
373	Ship and boat building and repairing	2
38	Measuring, analyzing, controlling instruments; photographic, medical, optical goods; watches and clocks	11
39	Miscellaneous manufacturing	11
40	Railroad transportation	8
41	Local/suburban transit and major interurban highway passenger transportation	8
42	Motor freight transportation/warehousing	8
4221	Farm product warehousing/storage	11
4222	Refrigerated warehousing/ storage	11
4225	General warehousing/ storage	11
43	U. S. Postal Service	8
44	Water transportation	8
45	Transportation by air	8
50	Wholesale Trade – Durable Goods	6
5015	Used motor vehicle parts	6
5093	Scrap and waste metals	6
51	Wholesale Trade – Non-Durable Goods	8
5171	Petroleum bulk stations and terminals	8

General Permit
No. GAR000000

State of Georgia
Department of Natural Resources
Environmental Protection Division

Authorization To Discharge Under The National Pollutant Discharge Elimination System Storm Water Discharges Associated With Industrial Activity

In compliance with the provisions of the Georgia Water Quality Control Act (Georgia Laws 1964, p. 416, as amended), hereinafter called the "State Act," the Federal Clean Water Act, as amended (33 U.S.C. 1251 et seq.), hereinafter called the "Clean Water Act," and the Rules and Regulations promulgated to each of these Acts, new and existing storm water point sources within the State of Georgia that are required to have a permit, upon submittal of a Notice of Intent, are authorized to discharge storm water associated with industrial activity to the waters of the State of Georgia in the accordance with the limitations, monitoring requirements and others conditions set forth in Parts I through VIII hereof.

This permit shall become effective on

This permit and the authorization to discharge shall expire at midnight, **October 1, 1997.**

Signed this ___ day of ___ .

[SEAL]

Director,
Environmental Protection
Division

NPDES GENERAL PERMIT
for
STORM WATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY

PART I. COVERAGE UNDER THIS PERMIT

A. *Permit Area.*
The permit covers all discharges of storm water associated with industrial activity from point sources to the waters of the State of Georgia.

B. *Eligibility.*

1. This permit may cover all new and existing point source discharges of storm water associated with industrial activity to waters of the State of Georgia, except for storm water discharges identified under paragraph I.B.3.

2. This permit may authorize storm water discharges associated with industrial activity that are mixed with storm water discharges associated with industrial activity from construction activities provided that the storm water discharge from the construction activity is in compliance with the terms, including applicable NOI or application requirements, of a different NPDES general permit or individual permit authorizing such discharges.

3. *Limitations on coverage.* The following storm water discharges associated with industrial activity are not authorized by this permit:

   a. storm water discharges associated with industrial activity that are mixed with sources of non-storm water other than non-storm water discharges that are:

   (i) in compliance with a different NPDES permit; or

   (ii) identified by and in compliance with Part III.A.2 (authorized non-storm water discharges) of this permit.

b. storm water discharges associated with industrial activity which are subject to an existing effluent limitation guideline addressing storm water (or a combination of storm water and process water);

c. storm water discharges associated with industrial activity that are subject to an existing NPDES individual or general permit, except for individual NPDES permits which authorize storm water discharges under Part II.B.16 of the individual permit. Such discharges may be authorized under this permit after an existing permit expires provided the existing permit did not establish numeric limitations for such discharges;

d. storm water discharges associated with industrial activity from construction sites, except storm water discharges from portions of a construction site that can be classified as an industrial activity under 40 CFR 122.26(b) (14) (i) through (ix) or (xi) (including storm water discharges from mobile asphalt plant, and mobile concrete plants).

e. storm water discharges associated with industrial activity that the Director has determined to be or may reasonably be expected to be contributing to a violation of a water quality standard; and

f. storm water discharges associated with industrial activity from inactive mining, inactive landfills, or inactive oil and gas operations occurring on Federal lands where an operator cannot be identified.

4. Storm water discharges associated with industrial activity which are authorized by this permit may be combined with other sources of storm water which are not classified as associated with industrial activity

pursuant to 40 CFR 122.26(b) (14), so long as the discharger is in compliance with this permit.

C. *Authorization.*

1. Dischargers of storm water associated with industrial activity must submit a Notice of Intent (NOI) in accordance with the requirements of Part II of this permit, using a NOI form provided by the Director (or photocopy thereof), to be authorized to discharge under this general permit.

2. Unless notified by the Director to the contrary, owners or operators who submit such notification are authorized to discharge storm water associated with industrial activity under the terms and conditions of this permit 48 hours after the date that the NOI is postmarked.

3. The Director may deny coverage under this permit and require submittal of an application for an individual NPDES permit based on a review of the NOI or other information.

PART II. NOTICE OF INTENT REQUIREMENTS

A. *Deadlines for Notification.*

1. Except as provided in paragraphs II.A.4 (new operator) and II.A.5 (late NOIs), individuals who intend to obtain coverage for an existing storm water discharge associated with industrial activity under this general permit shall submit a Notice of Intent (NOI) in accordance with the requirements of this part thirty (30) days after the issuance of this permit;

2. Except as provided in paragraphs II.A.3 (oil and gas operations), II.A.4 (new operator), and II.A.5 (late NOI) operators of facilities which begin industrial activity after issuance of this permit shall submit a NOI in accordance with the requirements of this part at least 48 hours prior to the commencement of the industrial activity at the facility;

3. Operators of oil and gas exploration, production, processing, or treatment operations or transmission facilities, that are not required to submit a permit application as of October 1, 1992 in accordance with 40 CFR 122.26(c) (1) (iii), but that after October 1,1992 have a discharge of a reportable quantity of oil or a hazardous substance for which notification is required pursuant to either Georgia's Oil or Hazardous Material Spills or Releases Act (O.C.G.A. § 12-14-2), 40 CFR 110.6, 40 CFR 117.21 or 40 CFR 302.6, must submit a NOI in accordance with the requirements of Part II.C of this permit within 14 calendar days of the first knowledge of such release.

4. Where the Operator of a facility with a storm water discharge associated with industrial activity which is covered by this permit changes, the new operator of the facility must submit an NOI in accordance with the requirements of this part at least 48 hours prior to the change.

5. An operator of a storm water discharge associated with industrial activity is not precluded from submitting an NOI in accordance with the requirements of this part after the dates provided in Parts II.A.1, 2, or 3 (above) of the permit. In such instances, the Georgia Environmental Protection Division (EPD) may bring an enforcement action for failure to submit an NOI in a timely manner or for any unauthorized discharges of storm water associated with industrial activity that have occurred on or after the dates specified in Part II.A.1, 2, or 3 (above).

B. *Contents of Notice of Intent.* This Notice of Intent shall be signed in accordance with Part VII.G (signatory requirements) of this permit and shall include the following information:

1. Name, mailing address, county, and location of the facility for which the notification is submitted. Where a mailing address for the site is not available, the location can be described in narrative terms or in

terms of the latitude and longitude of the approximate center of the facility to the nearest 15 seconds where the facility is located.

2. Up to four 4-digit Standard Industrial Classification (SIC) codes that best represent the principal products or activities provided by the facility;

3. The operator's name, address, telephone number, and status as Federal, State, private, public or other entity;

4. The permit number of additional NPDES permits for any discharges (including non-storm water discharges) from the site that are currently authorized by an NPDES permit;

5. The name of the receiving water(s), or if the discharge is through a municipal separate storm sewer, the name of the municipal operator of the storm sewer and the receiving water(s) for the discharge through the municipal separate storm sewer;

6. An indication of whether the owner or operator has existing quantitative data describing the concentration of pollutants in storm water discharges (existing data should not be included as part of the NOI); and

7. An indication as to whether the facility has previously participated in the group application process. Where a facility has participated in a group application, the number EPA assigned to the group application shall be supplied.

C. *Where to Submit.* Facilities which discharge storm water associated with industrial activity must use a NOI form provided by the EPD Director (or photocopy thereof). Forms are available by calling (404) 656-4887. NOIs must be signed in accordance with Part VII.G (signatory requirements) of this permit. NOIs are to be submitted to the EPD Director at the following address:

Georgia Environmental Protection Division
Industrial Wastewater Program
Floyd Towers East, Room 1070
205 Butler Street, S.E.
Atlanta, Georgia 30334

D. **Additional Notification.** Facilities which discharge storm water associated with industrial activity through large or medium municipal separate storm sewer systems (systems located in an incorporated city with a population of 100,000 or more, or in a county identified as having a large or medium system) shall, in addition to filing copies of the Notice of Intent in accordance with paragraph II.C, also submit signed copies of the Notice of Intent to the operator of the municipal separate storm sewer through which they discharge in accordance with the deadlines in Part II.A (deadlines for notification) of this permit.

E. **Renotification.** Upon issuance of a new general permit for some or all of the discharges of storm water covered by this permit, the permittee is required to notify the Director of their intent to be covered by the new general permit. The permittee must submit a new NOI in accordance with the notification requirements of the new general permit.

Part III. SPECIAL CONDITIONS

A. **Prohibition on Non-storm Water Discharges.**

1. Except as provided in paragraph III.A.2 (below), all discharges covered by this permit shall be composed entirely of storm water.

2. a. Except as provided in paragraph III.A.2.b (below), discharges of material other than storm

water must be in compliance with a NPDES permit (other than this permit) issued for the discharge.

b. The following non-storm water discharges may be authorized by this permit provided the non-storm water component of the discharge is in compliance with the measures and controls for non-storm water discharges portion of the storm water pollution prevention plan: discharges from fire fighting activities; fire hydrant flushings; potable water sources including waterline flushings; irrigation drainage; lawn watering; routine external building washdown which does not use detergents or other compounds; pavement washwaters where spills or leaks of toxic or hazardous materials have not occurred (unless all spilled material has been removed) and where detergents are not used; air conditioning condensate; springs; uncontaminated ground water; and foundation or footing drains where flows are not contaminated with process materials.

B. **Releases in Excess of Reportable Quantities.**

1. The discharge of hazardous substances or oil in the storm water discharge(s) from a facility shall be prevented or minimized in accordance with the applicable storm water pollution prevention plan for the facility. This permit does not relieve the permittee of the reporting requirements of Georgia's Oil or Hazardous Material Spills or Releases Act (O.C.G.A. §12-14-2), 40 CFR part 117 and 40 CFR part 302. Where a release containing a hazardous substance in an amount equal to or in excess of a reporting quantity established under either Georgia's Oil or Hazardous Material Spills or Releases Act (O.C.G.A. §12-14-2), 40 CFR 117 or 40 CFR 302, occurs during a 24 hour period:

a. The discharger is required to notify EPD at (404) 656-4813 or 800-241-4113 and the National Response Center (NRC) at 800-424-8802 in accordance with the requirements of Georgia's Oil or Hazardous Material Spills or Releases Act (O.C.G.A. §12-14-2), 40 CFR 117 and 40 CFR 302 as soon as he or she has knowledge of the discharge;

b. The permittee shall submit within 14 calendar days of knowledge of the release a written description of: the release (including the type and estimate of the amount of material released), the date that such release occurred, the circumstances leading to the release, and steps to be taken in accordance with paragraph III.B.1.c (below) of this permit to EPD at the address provided in Part II.C of this permit and to Georgia's Emergency Response Team at:

Emergency Response Team
Georgia Environmental Protection Division
Floyd Towers East, Room 1166
205 Butler St., S.E.
Atlanta, GA 30334; and

c. The Storm Water Pollution Prevention Plan required under Part IV (Storm Water Pollution Prevention Plans) of this permit must be modified within 14 calendar days of knowledge of the release to: provide a description of the release, the circumstances leading to the release, and the date of the release. In addition, the plan must be reviewed to identify measures to prevent the reoccurrence of such releases and to respond to such releases, and the plan must be modified where appropriate.

2. Spills. This permit does not authorize the discharge of hazardous substances or oil resulting from an on-site spill.

Part IV. STORM WATER POLLUTION PREVENTION PLANS

A Storm Water Pollution Prevention Plan shall be developed for each facility covered by this permit. Storm Water Pollution Prevention Plans shall be prepared in accordance with good engineering practices. The plan shall identify potential sources of pollution which may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility. In addition, the plan shall describe and ensure the implementation of practices which are to be used to reduce the pollutants in storm water discharges associated with industrial activity at the facility and to assure compliance with the terms and conditions of this permit. Facilities must implement the provisions of the Storm Water Pollution Prevention Plan required under this part as a condition of this permit.

A. Deadlines for Plan Preparation and Compliance.

1. Except as provided in paragraphs IV.A.2 and IV.A.3 (oil and gas operations), the plan for a storm water discharge associated with industrial activity that is existing prior to December 31, 1992:

   a. shall be prepared on or before April 1, 1993 (and updated as appropriate);

   b. shall provide for implementation and compliance with the terms of the plan on or before October 1, 1993;

2. The plan for any facility where industrial activity commences after January 1, 1993 shall be prepared,

and except as provided elsewhere in this permit, shall provide for compliance with the terms of the plan and this permit on or before the date 60 calendar days after the commencement of industrial activity (and updated as appropriate);

3. The plan for storm water discharges associated with industrial activity from an oil and gas exploration, production, processing, or treatment operation or transmission facility that is not required to submit a permit application on or before October 1, 1992 in accordance with 40 CFR 122.26(c)(1)(iii), but after October 1, 1992 has a discharge of a reportable quantity of oil or a hazardous substance for which notification is required pursuant to either Georgia's Oil or Hazardous Material Spills or Releases Act (O.C.G.A. §12-14-2), 40 CFR 110.6, 40 CFR 117.21 or 40 CFR 302.6, shall be prepared and except as provided elsewhere in this permit, shall provide for compliance with the terms of the plan and this permit on or before the date 60 calendar days after the first knowledge of such release (and updated as appropriate); and

4. Upon a showing of good cause, the Director may establish a later date in writing for preparing and compliance with a plan for a storm water discharge associated with industrial activity that submits a NOI in accordance with Part II.A.2 (deadlines for notification – new dischargers) of this permit (and updated as appropriate).

B. **Signature and Plan Review**.

1. The plan shall be signed in accordance with Part VII.G (signatory requirements), and be retained onsite at the facility which generates the storm water discharge in accordance with Part VI.D (retention of records) of this permit.

2. The permittee shall make plans available upon request to the Director, or authorized representative, and in the case of a storm water discharge associated with industrial activity which discharges through a municipal separate storm sewer system, to the operator of the municipal system.

3. The Director or authorized representative, may notify the permittee at any time that the plan does not meet one or more of the minimum requirements of this Part. Within thirty (30) days of such notification from the Director, (or as otherwise provided by the Director), or authorized representative, the permittee shall make the required changes to the plan and shall submit to the Director a written certification that the requested changes have been made.

C. **Keeping Plans Current.** The permittee shall amend the plan whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to the waters of the State of Georgia or if the Storm Water Pollution Prevention Plan proves to be ineffective in eliminating or significantly minimizing pollutants from sources identified in this plan (description of potential pollutant sources), or in otherwise achieving the general objectives of controlling pollutants in storm water discharges associated with industrial activity. Amendments to the plan may be reviewed by EPD in the same manner as Part IV.B (above).

D. **Contents of Plan.** The plan shall be prepared in accordance with the requirements, guidelines, and recommendations in the U.S. Environmental Protection Agency documents titled STORM WATER POLLUTION PREVENTION PLANS FOR INDUSTRIAL ACTIVITIES and NPDES BEST MANAGEMENT

PRACTICES DOCUMENT (JUNE 1981). Both documents are available from the U.S. Government Printing Office or the U.S. Environmental Protection Agency. The plan shall include, at a minimum, the following items:

1. Pollution prevention team. Each plan shall identify a specific individual or individuals within the facility organization as members of a storm water Pollution Prevention Team that are responsible for developing the plan and assisting the facility or plant manager in its implementation, maintenance, and revision. The plan shall clearly identify the responsibilities of each team member. The activities and responsibilities of the team shall address all aspects of the facility's plan.

2. Description of potential pollutant sources. Each plan shall provide a description of potential sources which may reasonably be expected to add significant amounts of pollutants to storm water discharges or which may result in the discharge of pollutants during dry weather from separate storm sewers draining the facility. Each plan shall identify all activities and significant materials which may potentially be significant pollutant sources. Each plan shall include, at a minimum:

   a. *Drainage.*

   (1) A site map indicating an outline of the portions of the drainage area of each storm water outfall that are within the facility boundaries, each existing structural control measure to reduce pollutants in storm water runoff, surface water bodies, locations where significant materials are exposed to precipitation, locations where major spills or leaks identified under Part IV.D.2.c (spills and leaks) of this permit have occurred, and the locations of the following activities

where such activities are exposed to precipitation: fueling stations, vehicle and equipment maintenance and/or cleaning areas, loading/unloading areas, locations used for the treatment, storage or disposal of wastes, liquid storage tanks, processing areas and storage areas.

(2) For each area of the facility that generates storm water discharges associated with industrial activity with a reasonable potential for containing significant amounts of pollutants, a prediction of the direction of flow, and an identification of the types of pollutants which are likely to be present in storm water discharges associated with industrial activity. Factors to consider include the toxicity of chemical; quantity of chemicals used, produced or discharged; the likelihood of contact with storm water; and history of significant leaks or spills of toxic or hazardous pollutants. Flows with a significant potential for causing erosion shall be identified.

b. *Inventory of exposed materials.* An inventory of the types of materials handled at the site that potentially may be exposed to precipitation. Such inventory shall include a narrative description of significant materials that have been handled, treated, stored or disposed in a manner to allow exposure to storm water between the time of three years prior to the date of the issuance of this permit and the present; method and location of on-site storage or disposal; materials management practices employed to minimize contact of materials with storm water runoff between the time of three years prior to the date of the issuance of this permit and the present;

the location and a description of existing structural and non-structural control measures to reduce pollutants in storm water runoff; and a description of any treatment the storm water receives.

c. *Spills and leaks.* A list of significant spills and significant leaks of toxic or hazardous pollutants that occurred at areas that are exposed to precipitation or that otherwise drain to a storm water conveyance at the facility after the date of three years prior to the effective date of this permit. Such list shall be updated as appropriate during the term of the permit.

d. *Sampling data.* A summary of existing discharge sampling data describing pollutants in storm water discharges from the facility, including a summary of sampling data collected during the term of this permit.

e. *Risk identification and summary of potential pollutant sources.* A narrative description of the potential pollutant sources at the following areas: loading and unloading operations; outdoor storage activities; outdoor manufacturing or processing activities; significant dust or particulate generating processes; and on-site waste disposal practices. The description shall specifically list any significant potential source of pollutants at the site and for each potential source, any pollutant or pollutant parameter (e.g. biochemical oxygen demand, etc.) of concerns shall be identified.

3. Measures and controls. Each facility covered by this permit shall develop a description of storm water management controls appropriate for the facility, and implement such controls. The appropriateness and priorities of controls in a plan shall reflect identified

potential sources of pollutants at the facility. The description of storm water management controls shall address the following minimum components, including a schedule for implementing such controls:

a. *Good housekeeping.* Good housekeeping requires the maintenance of areas which may contribute pollutants to storm waters discharges in a clean, orderly manner.

b. *Preventive maintenance.* A preventive maintenance program shall involve timely inspection and maintenance of storm water management devices (e.g. cleaning oil/water separators, catch basins) as well as inspecting and testing facility equipment and systems to uncover conditions that could cause breakdowns or failures resulting in discharges of pollutants to surface waters, and ensuring appropriate maintenance of such equipment and systems.

c. *Spill prevention and response procedures.* Areas where potential spills which can contribute pollutants to storm water discharges can occur, and their accompanying drainage points shall be identified clearly in the plan. Where appropriate, specifying material handling procedures, storage requirements, and use of equipment such as diversion valves in the plan should be considered. Procedures for cleaning up spills shall be identified in the plan and made available to the appropriate personnel. The necessary equipment to implement a clean up should be available to personnel.

d. *Inspections.* In addition to or as part of the comprehensive site evaluation required under Part IV.4 (comprehensive site compliance evaluation) of this permit, qualified facility personnel shall be identified to inspect designated

equipment and areas of the facility at appropriate intervals specified in the plan. A set of tracking or followup procedures shall be used to ensure that appropriate actions are taken in response to the inspections. Records of inspections shall be maintained.

e. *Employee training.* Employee training programs shall inform personnel responsible for implementing activities identified in the plan or otherwise responsible for storm water management at all levels of responsibility of the components and goals of the plan. Training should address topics such as spill response, good housekeeping and material management practices. The plan shall identify periodic dates for such training.

f. *Recordkeeping and internal reporting procedures.* A description of incidents such as spills, or other discharges, along with other information describing the quality and quantity of storm water discharges shall be included in the plan required under this part. Inspections and maintenance activities shall be documented and records of such activities shall be incorporated into the plan.

g. *Non-storm water discharges.*

(1) The plan shall include a certification that the discharge has been tested or evaluated for the presence of non-storm water discharges. The certification shall include the identification of potential significant sources of non-storm water at the site, a description of the results of any test and/or evaluation for the presence of non-storm water discharges, the evaluation criteria or testing method used, the date of any testing and/or evaluation, and the on-site drainage points that

were directly observed during the test. Certifications shall be signed in accordance with Part VII.G of this permit. Such certification may not be feasible if the facility operating the storm water discharge associated with industrial activity does not have access to an outfall, manhole, or other point of access to the ultimate conduit which receives the discharge. In such cases, the source identification section of the plan shall indicate why the certification required by this part was not feasible, along with the identification of potential significant sources of non-storm water at the site.

(2) Except for flows from fire fighting activities, sources of non-storm water listed in Part III.A.2 (authorized non-storm water discharges) of this permit that are combined with storm water discharges associated with industrial activity must be identified in the plan. The plan shall identify and ensure the implementation of appropriate pollution prevention measures for the non-storm water component(s) of the discharge.

h. *Sediment and erosion control.* The plan shall identify areas which, due to topography, activities, or other factors, have a high potential for significant soil erosion, and identify structural, vegetative, and/or stabilization measures to be used to limit erosion.

i. *Management of runoff.* The plan shall contain a narrative consideration of the appropriateness of traditional storm water management practices (practices other than those which control the generation or source(s) of pollutants) used to divert, infiltrate, reuse, or otherwise manage storm water runoff in a manner that reduces pollutants in storm water discharges from the

site. The plan shall provide that measures determined to be reasonable and appropriate shall be implemented and maintained. The potential of various sources at the facility to contribute pollutants to storm water discharges associated with industrial activity (see Parts IV.D.2. (description of potential pollutant sources) of this permit) shall be considered when determining reasonable and appropriate measures. Appropriate measures may include: vegetative swales and practices, reuse of collected storm water (such as for a process or as an irrigation source), inlet controls (such as oil/water separators), snow management activities, infiltration devices, and wet detention/retention devices.

4. Comprehensive site compliance evaluation/inspection. Qualified personnel shall conduct site compliance evaluations and inspection at appropriate intervals specified in the plan, but except as provided in this part, in no case less than once a year. Such evaluations shall provide:

   a. Areas contributing to a storm water discharge associated with industrial activity shall be visually inspected for evidence of, or the potential for, pollutants entering the drainage system. Measures to reduce pollutant loadings shall be evaluated to determine whether they are adequate and properly implemented in accordance with the terms of the permit or whether additional control measures are needed. Structural storm water management measures, sediment and erosion control measures, and other structural pollution prevention measures identified in the plan shall be observed to ensure that they are operating correctly. A visual inspection of

equipment needed to implement the plan, such as spill response equipment, shall be made.

b. Based on the results of the inspection, the description of potential pollutant sources identified in the plan (description of potential pollutant sources) and pollution prevention measures and controls identified (measures and controls) shall be revised as appropriate within two weeks of such inspection and shall provide for implementation of any changes to the plan in a timely manner, but in no case more than twelve weeks after the inspection.

c. A report summarizing the scope of the inspection, personnel making the inspection, the date(s) of the inspection, major observations relating to the implementation of the plan, and actions taken in accordance with paragraph IV.D.4.b (above) of the permit shall be made and retained as part of the plan for at least one year after coverage under this permit terminates. The report shall be signed in accordance with Part VII.G (signatory requirements) of this permit. This report shall not be submitted to the Director unless specifically requested in writing.

d. Where annual site inspections are shown in the plan to be impractical for inactive mining sites due to the remote location and inaccessibility of the site, site inspections required under this part shall be conducted at appropriate intervals specified in the plan, but, in no case less than once in three years.

5. Additional requirements for storm water discharges associated with industrial activity through municipal separate storm sewer systems serving a population of 100,000 or more.

a. In addition to the applicable requirements of this permit, facilities covered by this permit must comply with applicable requirements in municipal storm water management programs developed under NPDES permits issued for the discharge of the municipal separate storm sewer system that receives the facility's discharge.

b. Permittees which discharge storm water associated with industrial activity through a municipal separate storm sewer system serving a population of 100,000 or more shall make plans available to the municipal operator of the system upon request.

6. Consistency with other plans. Storm Water Pollution Prevention Plans may reflect requirements for Spill Prevention Control and Countermeasures (SPCC) plans developed for the facility under Section 311 of the CWA or Best Management Practices (BMP) Programs otherwise required by an NPDES permit for the facility as long as such requirement is incorporated into the Storm Water Pollution Prevention Plan.

7. Additional requirements for salt storage. Storage piles of salt used for deicing or other commercial or industrial purposes and which generate a storm water discharge associated with industrial activity which is discharged to the waters of Georgia shall be enclosed or covered to prevent exposure to precipitation, except for exposure resulting from adding or removing materials from the pile. Dischargers shall demonstrate compliance with this provision as expeditiously as practicable, but in no event later than three years after issuance of this permit. Piles do not need to be enclosed or covered where storm water from the pile is not discharged to the waters of Georgia.

PART V. NUMERIC EFFLUENT LIMITATION

Coal Pile Runoff. Any discharge composed of coal pile runoff shall not exceed a maximum concentration for any time of 50 mg/L Total Suspended Solids. Coal pile runoff shall not be diluted with storm water or other flows in order to meet this limitation. The pH of such discharges shall be within the range of 6.0-9.0. Any untreated overflow from facilities designed, constructed and operated to treat the volume of coal pile runoff which is associated with a 10 year, 24 hour rainfall event shall not be subject to the 50 mg/L limitation for Total Suspended Solids. Failure to demonstrate compliance with these limitations as expeditiously as practicable, but in no case later than three years after the date of issuance of this permit will constitute a violation of this permit.

PART VI. MONITORING AND REPORTING REQUIREMENTS

A. Monitoring Requirements.

1. *Limitations on monitoring requirements.* The Director can provide written notice to any facility with the activities specifically identified in Part VI.B.2 of this permit to conduct sampling of their storm water discharges associated with industrial activity on a schedule specified by the Director.

2. *Optional monitoring requirements.* During the period beginning on the effective date and lasting through the expiration date of this permit, permittees with facilities identified in Parts VI.A.2.a through j may consider monitoring those storm water discharges identified below to document the presence of any pollutants. Permittees are not to submit monitoring results, unless specifically required in writing by the Director. if monitoring of the storm water discharges

is conducted, the permittee must retain monitoring results in accordance with Part VI.D (retention of records). In addition to the parameters suggested below, the permittee should record the date and duration (in hours) of the storm event(s) sampled; rainfall measurements or estimates (in inches) of the storm event which generated the sampled runoff; the duration between the storm event sampled and the end of the previous measurable (greater than 0.1 inch rainfall) storm event; and an estimate of the total volume (in gallons) of the discharge sampled;

a. *Section 313 of SARA Title III facilities.* In addition to any monitoring shown in Parts VI.A.2.b through j, facilities with storm water discharges associated with industrial activity that are subject to requirements to report releases into the environment under Section 313 of SARA Title III for chemicals which are classified as 'Section 313 water priority chemicals' should monitor the storm water that is discharged from the facility that comes into contact with any equipment, tank, container or other vessel or area used for storage of a Section 313 water priority chemical, or located at a truck or rail car loading or unloading area where a Section 313 water priority chemical is handled for: Oil and Grease (mg/L); Five Day Biochemical Oxygen Demand (BOD5) (mg/L); COD (mg/L); Total Suspended Solids (TSS) (mg/L); Total Kjeldahl Nitrogen (TKN) (mg/L); Total Phosphorus (mg/L); pH; Acute Whole Effluent Toxicity; and any Section 313 water priority chemical for which the facility is subject to reporting requirements under section 313 of the Emergency Planning and Community Right to Know Act of 1986.

b. *Primary metal industries.* Facilities with storm water discharges associated with industrial activity classified as Standard Industrial Classification (SIC) 33 (Primary Metal Industry) should monitor such storm water that is discharged from the facility for: Oil and Grease (mg/L); BOD5 (mg/L); Chemical Oxygen Demand (COD) (mg/L); TSS (mg/L); pH; Acute Whole Effluent Toxicity; Total Lead (mg/L); Total Cadmium (mg/L); Total Copper (mg/L); Total Arsenic (mg/L); Total Chromium (mg/L); and any pollutant limited in an effluent guideline to which the facility is subject.

c. *Land disposal units/incinerators/BIFs.* Facilities with storm water discharges associated with industrial activity from any active or inactive landfill, land application sites or open dump without a stabilized final cover that has received any industrial wastes (other than wastes from a construction site); and incinerators (including Boilers and Industrial Furnaces (BIFs)) that burn hazardous waste and operate under interim status or a permit under Subtitle C of RCRA, should monitor such storm water that is discharged from the facility for: Ammonia (mg/L), Magnesium (total) (mg/L), Magnesium (dissolved) (mg/L), Nitrate plus Nitrite Nitrogen (mg/L), COD (mg/L), Total Dissolved Solids (TDS) (mg/L), Total Organic Carbon (TOC) (mg/L), Oil and Grease (mg/L), pH, Total Arsenic (mg/L), Total Barium (mg/L), Total Cadmium (mg/L), Total Chromium (mg/L), Total Cyanide (mg/L), Total Lead (mg/L), Total Mercury (mg/L), Total Selenium (mg/L), Total Silver (mg/L), and Acute Whole Effluent Toxicity.

d. *Wood treatment.* Facilities with storm water discharges associated with industrial activity from areas that are used for wood treatment, wood surface application or storage of treated or surface protected wood at any wood preserving or wood surface facilities should monitor such storm water that is discharged from the facility for: Oil and Grease (mg/L), pH, BOD5 (mg/L), COD (mg/L), and TSS (mg/L). In addition, facilities that use chlorophenolic formulations shall measure pentachlorophenol (mg/L) and Acute Whole Effluent Toxicity; facilities which use creosote formulations shall measure Acute Whole Effluent Toxicity; and facilities that use chromium-arsenic formulations shall measure Total Arsenic (mg/L), Total Chromium (mg/L), and Total Copper (mg/L).

e. *Coal pile runoff.* Facilities with storm water discharges associated with industrial activity from coal pile runoff should monitor such storm water that is discharged from the facility for: Oil and Grease (mg/L), pH, TSS (mg/L), Total Copper (mg/l), Total Nickel (mg/l) and Total zinc (mg/l).

f. *Battery reclaimers.* Facilities with storm water discharges associated with industrial activity from areas used for storage of lead acid batteries, reclamation products, or waste products, and areas used for lead acid battery reclamation (including material handling activities) at facilities that reclaim lead acid batteries should monitor such storm water that is discharged from the facility for: Oil and Grease (mg/L); COD (mg/L); TSS (mg/L); pH; Total Copper (mg/l); and Total Lead (mg/l).

g. *Airports.* At airports with over 50,000 flight operations per year, facilities with storm water discharges associated with industrial activity from areas where aircraft or airport deicing operations occur (including runways, taxiways, ramps, and dedicated aircraft deicing stations) should monitor such storm water that is discharged from the facility when deicing activities are occurring for: Oil and Grease (mg/L); BOD5 (mg/L); COD (mg/L); TSS (mg/L); pH; and the primary ingredient used in the deicing materials used at the site (e.g. ethylene glycol, urea, etc.).

h. *Coal-fired steam electric facilities.* Facilities with storm water discharges associated with industrial activity from coal handling sites at coal fired steam electric power generating facilities (other than discharges in whole or in part from coal piles subject to storm water effluent guidelines at 40 CFR 423 – which are not eligible for coverage under this permit) should monitor such storm water that is discharged from the facility for: Oil and Grease (mg/L), pH, TSS (mg/L), Total Copper (mg/l), Total Nickel (mg/l) and Total Zinc (mg/l).

i. *Animal handling / meat packing.* Facilities with storm water discharges associated with industrial activity from animal handling areas, manure management (or storage) areas, and production waste management (or storage) areas that are exposed to precipitation at meat packing plants, poultry packing plants, and facilities that manufacture animal and marine fats and oils, should monitor such storm water that is discharged from the facility for: BOD5 (mg/L); COD (mg/L); TSS (mg/L); TKN (mg/

L); Total Phosphorus (mg/L); pH; and Fecal Coliform (counts per 100 ml).

j. *Additional facilities.* Facilities with storm water discharges associated with industrial activity that:

(i) come in contact with storage piles for solid chemicals used as raw materials that are exposed to precipitation at facilities classified as SIC 30 (Rubber and Miscellaneous Plastics Products) or SIC 28 (Chemicals and Allied Products);

(ii) are from those areas at automobile junkyards with any of the following: (A) over 250 auto/truck bodies with drivelines (engine, transmission, axles, and wheels), 250 drivelines, or any combination thereof (in whole or in parts) are exposed to storm water; (B) over 500 auto/truck units (bodies with or without drivelines in whole or in parts) are stored exposed to storm water; or (C) over 100 units per year are dismantled and drainage or storage of automotive fluids occurs in areas exposed to storm water;

(iii) come into contact with lime storage piles that are exposed to storm water at lime manufacturing facilities;

(iv) are from oil handling sites at oil fired steam electric power generating facilities;

(v) are from cement manufacturing facilities and cement kilns (other than discharges in whole or in part from material storage piles subject to storm water effluent guidelines at 40 CFR 411 – which are not eligible for coverage under this permit);

(vi) are from ready-mixed concrete facilities; or

(vii) are from ship building and repairing facilities;

should monitor such storm water discharged from the facility for: Oil and Grease (mg/L); COD (mg/L); TSS (mg/L); pH; and any pollutant limited in an effluent guideline to which the facility is subject.

3. Sample type. For discharges from holding ponds or other impoundments with a retention period greater than 24 hours, (estimated by dividing the volume of the detention pond by the estimated volume of water discharged during the 24 hours previous to the time that the sample is collected) a minimum of one grab sample may be taken. For all other discharges, data shall be reported for both a grab sample and a composite sample. All such samples shall be collected from the discharge resulting from a storm event that is greater than 0.1 inches In magnitude and that occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) storm event. The grab sample shall be taken during the first thirty minutes of the discharge. If the collection of a grab sample during the first thirty minutes is impracticable, a grab sample can be taken during the first hour of the discharge, and the discharger shall submit with the monitoring report a description of why a grab sample during the first thirty minutes was impracticable. The composite sample shall either be flow-weighted or time-weighted. Composite samples may be taken with a continuous sampler or as a combination of a minimum of three sample aliquot taken in each hour of discharge for the entire discharge or for the first three hours of the discharge, with each aliquot being separated by a minimum period of fifteen minutes. Grab samples only must be collected and analyzed for the determination of pH, cyanide, whole effluent toxicity, and oil and grease.

4. Representative discharge. When a facility has two or more outfalls that, based on a consideration of industrial activity, significant materials, and management practices and activities within the area drained by the outfall, the permittee reasonably believes discharge substantially identical effluent, the permittee may test the effluent of one of such outfalls and report that the quantitative data also applies to the substantially identical outfalls. In addition, for each outfall that the permittee believes is representative, an estimate of the size of the drainage area (in square feet) and an estimate of the runoff coefficient of the drainage area (e.g., low (under 40 percent), medium (40 to 65 percent) or high (above 65 percent)) shall be provided.

B. **Toxicity Testing.** Permittees that are notified that they are required to monitor for acute whole effluent toxicity shall initiate the series of tests described below within the time period specified by the Director.

Test Procedures

a. The permittee shall conduct acute 24 hour static toxicity tests on both an appropriate invertebrate and an appropriate fish (vertebrate) test species (EPA/600/4-90-027 Rev. 9/91, Section 6.1.). Freshwater species must be used for discharges to freshwater waterbodies. Due to the non-saline nature of rainwater, freshwater test species should also be used for discharges to estuarine, marine or other naturally saline waterbodies.

b. All test organisms, procedures and quality assurance criteria used shall be in accordance with *Methods for Measuring the Acute Toxicity of effluent and Receiving Waters to Freshwater and Marine Organisms,* EPA/600/4-90-027 (Rev. September

1991). U.S. EPA has proposed to establish regulations regarding these test methods in the Federal Register December 4, 1989, 53 *FR* 50216.

c. Tests shall be conducted on a grab sample of the discharge at 100 percent strength (no dilution) and a control consisting of synthetic dilution water. Results of all tests conducted with any species shall be reported according to EPA/600/4-90-027 (Rev. September 1991), Section 12, Report Preparation.

C. **Reporting.**

1. Except as provided in Part VI.C.2, permittees are not to submit monitoring results or a certification, unless required in writing by the Director.

2. Facilities with at least one storm water discharge associated with industrial activity through a large or medium municipal separate storm sewer system (systems serving a population of 100,000 or more) must, upon the request of the municipality, submit signed copies of any monitoring reports, certifications and data to the operator of the municipal separate storm sewer system.

D. **Retention of Records.**

1. The permittee shall retain the Storm Water Pollution Prevention Plan developed in accordance with Part IV (Storm Water Pollution Prevention Plans) of this permit until at least one year after coverage under this permit terminates. The permittee shall retain all records of all monitoring information, copies of all reports required by this permit, and records of all data used to complete the Notice of Intent to be covered by this permit, until at least one year after coverage under this permit terminates. This period may be explicitly modified by alternative provisions of this permit (see paragraph VI.D.2 (below) of this

permit) or extended by request of the Director at any time.

2. For discharges subject to sampling requirements pursuant to Part VI.A (monitoring requirements), in addition to the requirements of paragraph VI.D.1 (above), permittees are required to retain for a three year period from the date of sample collection or for the term of this permit, which ever is greater, records of all monitoring information collected during the term of this permit. Permittees must submit such monitoring results to the Director upon the request of the Director.

PART VII. STANDARD PERMIT CONDITIONS

A. **Duty to Comply.**

1. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Georgia Water Quality Control Act (O.C.G.A. § 12-5-20) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2. Penalties for violations of permit conditions. The Federal Clean Water Act and the Georgia Water Quality Control Act provide that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required under this permit, makes any false statement, representation, or certification in any record or other documents submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance shall, upon conviction be punished by a fine or by imprisonment, or by both. The Federal Clean Water Act and the Georgia Water Quality Control Act also provide procedures

for imposing civil penalties which may be levied for violations of the Act, any permit condition or limitation established pursuant to the Act, or negligently or intentionally failing of refusing to comply with any final or emergency order of the Director.

B. **Continuation of the Expired General Permit**.

This permit expires on October 1, 1997. However, an expired general permit continues in force and effect until a new general permit is issued. Permittees must submit a new NOI in accordance with the requirements of Part II of this permit, using a NOI form provided by the Director (or photocopy thereof) ninety (90) days prior to the expiration date of this permit to remain covered under the continued permit. Facilities that had not obtained coverage under the permit by October 1, 1997 cannot become authorized to discharge under the continued permit.

C. **Need to Halt or Reduce Activity not a Defense.** It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. **Duty to Mitigate**. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

E. **Duty to Provide Information**. The permittee shall furnish to the Director, within a time specified by the Director, any information which the Director may request to determine compliance with this permit. The permittee shall also furnish to the Director upon request copies of records required to be kept by this permit.

F. **Other Information**. When the permittee becomes aware that he failed to submit any relevant facts or submitted incorrect information in the Notice of Intent or in any other report to the Director, he shall promptly submit such facts or information.

G. **Signatory Requirements**. All Notices of Intent, Notices of Termination, storm water pollution prevention plans, reports, certifications or information either submitted to the Director (and/or the operator of a large or medium municipal separate storm sewer system), or that this permit requires be maintained by the permittee, shall be signed.

1. All Notices of Intent shall be signed as follows:

   a. *For a corporation:* by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means: (1) a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25,000,000 (in second-quarter 1980 dollars) if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures;

   b. *For a partnership or sole proprietorship:* by a general partner or the proprietor, respectively; or

   c. *For a municipality, State, Federal, or other public agency:* by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes (1) the chief executive officer of

the agency, or (2) a senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrators of EPA).

2. All reports required by the permit and other information requested by the Director shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:

   a. The authorization is made in writing by a person described above and submitted to the Driector.

   b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of manager, operator, superintendent, or position of equivalent responsibility or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative may thus be either a named individual or any individual occupying a named position).

   c. *Changes to authorization.* If an authorization under paragraph VII.G.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new notice of intent satisfying the requirements of paragraph II.C must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

   d. *Certification.* Any person signing documents under this section shall make the following certification:

      "I certify under penalty of law that this document and all attachments were prepared under my

direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

H. *Oil and Hazardous Substance Liability.* Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under section 311 of the CWA or section 106 of CERCLA.

I. *Property Rights.* The issuance of this permit does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property nor any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

J. *Severability.* The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit shall not be affected thereby.

K. *Requiring an Individual Permit or an Alternative General Permit.*

The Director may require any person authorized by this permit to apply for and/or obtain either an individual NPDES permit or an alternative NPDES general permit.

L. *State/Environmental Laws.*

1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by section 510 of the Act.

2. No condition of this permit shall release the permittee from any responsibility or requirements under other environmental statutes or regulations.

M. *Proper Operation and Maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit and with the requirements of storm water pollution prevention plans. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

N. *Monitoring and Records.*

1. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. The permittee shall retain records of all monitoring information including all calibration and maintenance

records and all original strip chart recordings for continuous monitoring instrumentation, copies of the reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

3. *Records Contents.* Records of monitoring information shall include:

   a. The date, exact place, and time of sampling or measurements;

   b. The initials or name(s) of the individual(s) who performed the sampling or measurements;

   c. The date(s) analyses were performed;

   d. The time(s) anaylses were initiated;

   e. The initials or name(s) of the individual(s) who performed the analyses;

   f. References and written procedures, when available, for the analytical techniques or methods used; and

   g. The results of such analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine these results.

4. Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

O. *Inspection and Entry.* The permittee shall allow the Director or an authorized representative of EPA, the State, or, in the case of a facility which discharges through a municipal separate storm sewer, an authorized representative of the municipal operator or the

separate storm sewer receiving the discharge, upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted or where records must be kept under the conditions of this permit;

2. Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit; and

3. Inspect at reasonable times any facilities or equipment (including monitoring and control equipment).

P. *Permit Actions.* This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

Part VIII. TERMINATION OF COVERAGE

A. *Notice of Termination.* Where all storm water discharges associated with industrial activity that are authorized by this permit are eliminated, the operator of the facility may submit a Notice of Termination that is signed in accordance with Part VII.G (signatory requirements) of this permit. The Notice of Termination shall include the following information:

1. Name, mailing address, county, and location of the facility for which the notification is submitted. Where a mailing address for the site is not available, the location can be described in narrative terms or in terms of the latitude and longitude of the facility to the nearest 15 seconds where the facility is located;

2. Up to four 4-digit SIC codes that best represent the principal products or activities provided by the facility;

3. The operator's name, address, telephone number, ownership status and status as Federal, State, private, public or other entity;

4. The NPDES permit for the storm water discharge associated with industrial activity identified by the Notice of Termination; and

5. The following certification signed in accordance with Part VII.G (signatory requirements) of this permit:

> "I certify under penalty of law that all storm water discharges associated with industrial activity from the identified facility that are authorized by a NPDES general permit have been eliminated. I understand that by submitting this notice of termination, that I am no longer authorized to discharge storm water associated with industrial activity under this general permit, and that discharging pollutants in storm water associated with industrial activity to waters of the United States is unlawful under the Clean Water Act where the discharge is not authorized by a NPDES permit."

B. *Addresses.* All Notices of Termination are to be sent, using the form provided by the Director (or a photocopy thereof), to the Director of the NPDES program in care of the address shown in Part II.C.

Georgia Department of Natural Resources

205 Butler Street, S.E., East Floyd Tower,
Atlanta, Georgia 30334

Joe D. Tanner, Commissioner
Harold F. Reheis, Director
Environmental Protection Division

September 23, 1992

PUBLIC NOTICE
GEORGIA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL PROTECTION DIVISION

PUBLIC NOTICE NO. 92-16

NOTICE OF PROPOSED GENERAL NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS FOR STORM WATER DISCHARGES INTO WATERS OF THE STATE OF GEORGIA. NOTICE OF A PUBLIC HEARING ON PROPOSED GENERAL NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS FOR STORM WATER DISCHARGES.

The Environmental Protection Division (EPD) of the Georgia Department of Natural Resources proposes to issue two General National Pollutant Discharge Elimination System (NPDES) Permits for Storm Water Discharges. NPDES Permit No. GAR000000 will authorize storm water discharges from industrial facilities as defined in the Federal regulations promulgated under the Federal Clean Water Act. NPDES Permit No. GAR100000 will authorize storm water discharges from construction activities involving land disturbing activities of five or more acres. These NPDES General Permits authorize a category of applicants to discharge storm water in the

State of Georgia. NPDES Permits are valid for a maximum of five years.

Persons wishing to comment on the proposed general permits are invited to submit same in writing to the EPD address below, no later than October 29, 1992. All comments received prior to or on that date will be considered in the formulation of final determinations regarding these permits.

A public hearing will be held on the proposed NPDES General Permits on October 29, 1992 at 9:00 a.m. in Room 401 of the Department of Transportation, 2 Capitol Square, Atlanta, Georgia. The public hearing will be to present the proposed NPDES General Permits and to receive comments regarding these permits. At the October 29, 1992 public hearing, anyone may present data, make a statement, comment or offer a viewpoint either orally or in writing. Oral statements must be concise to permit everyone an opportunity to be heard. Written comments received on or before October 29, 1992 will be part of the hearing record. Written comments may be mailed to the EPD address below or delivered at the public hearing.

Copies of the proposed permits are available by writing the Environmental Protection Division and including a check in the amount of $12.50 to cover copying charges. The Federal regulations, draft permits, comments received, and other information are available to review at 205 Butler Street, S.E., Floyd Towers East, Room 1070, Atlanta, Georgia 30334, between 9:00 a.m. and 4:00 p.m., Monday through Friday. Copies of the proposed permits are also available for review at the EPD Regional Offices

in Albany, Brunswick and Macon, and at the Georgia Tech Research Institute, Economic Development Laboratory, Regional Offices in Augusta, Albany, Brunswick, Carrollton, Columbus, Douglas, Dublin, Gainesville, Macon, Madison, Rome and Savannah. Addresses for these additional review locations are available by calling (404) 656-4887. For additional information contact: Lawrence W. Hedges or Will Salter, Industrial Wastewater Program, phone (404) 6560-4887.

Please bring this notice to the attention of interested persons.

No. 96-420

Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Stephen E. O'Day, Esq.
Counsel of record
Mark W. Kinzer, Esq.
Michelle R. Craig, Esq.
Smith, Gambrell & Russell
Suite 3100, Promenade II
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
(404) 815-3500
Counsel for Petitioner
Terence D. Hughey

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. The Eleventh Circuit's Creation of an Exception to the Clean Water Act's "Zero Discharge Standard" is Contrary to Prior Decisions of this Court and to Longstanding Statutory Interpretations of the United States Environmental Protection Agency. 1

II. The Eleventh Circuit's Alternative Holding Should Also be Reviewed by This Court. 8

CONCLUSION 9

APPENDIX

1. 50 Federal Register, 35200-01 (Aug. 29, 1985) .. RA-2

2. 50 Federal Register, 32548-01 (Aug. 12, 1985) .. RA-4

3. Environmental News, EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT RA-5

TABLE OF AUTHORITIES

Cases

Federal:

Arkansas v. Oklahoma, 503 U.S. 91, 108, 112 S. Ct. 1046, 1058 (1992) 2

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company, 12 F.3d 353 (2d Cir. 1993), cert. denied,_____U.S._____, 115 S.Ct. 62 (1994) . 7

Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S. Ct. 1102, 1107 (1985) 2

Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-945, 104 S. Ct. 2778, 2781-2783 (1984) 5

City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638 (1992) 2

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 311, 101 S. Ct. 1784, 1789 (1981) 2

Combs v. Ryan's Coal Co., 785 F.2d 970, 978 (11th Cir. 1986), *cert. denied*, 479 U.S. 853, 107 S. Ct. 187 (1986) 8

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995) 2

E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977) 2

EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976) 2

EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) 2

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) 2

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996) 3

International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) 2

Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082, 111 S. Ct. 951 (1991) 8

Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir 1983) 2

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) 2

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), *reh'g denied*, 468 U.S. 1227 (1984) 2

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977) 2

Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995) 7

PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994) 2

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.,73F.3d 546 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3241, 65 U.S.L.W. 3256 (1996) (No. 95-1831) 2, 3, 7, 8

U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985) 8

United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980) 2

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 106 S. Ct. 455, 461 (1985) 2

U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992) 2

Weinberger v. Romero-Barcelo, 465 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982) 2

State:

Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 248 Ga. 826, 286 S.E. 707 (1982). 6

Statutes

33 U.S.C. § 1251 et seq. 1

33 U.S.C. § 1311 4

33 U.S.C. § 1342(k) 7

33 U.S.C. § 1342(p)(4)(A). 5

Regulations

50 Fed. Reg. 32548 (1985) 5

50 Fed. Reg. 35200 (1985) 5, 6

Rules

Federal:

Fed. R. Civ. P. 65. 8

State:

DNR Rule 391-3-6-.15 6

No. 96-420

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. The Eleventh Circuit's Creation of an Exception to the Clean Water Act's "Zero Discharge Standard" is Contrary to Prior Decisions of this Court and to Longstanding Statutory Interpretations of the United States Environmental Protection Agency.

In its Response to Terence D. Hughey's Petition for Writ *Certiorari*, JMS Development Corporation ("JMS") effectively acknowledges that the Federal Clean Water Act, 33 U.S.C. §

1251, et seq., ("CWA") contains an absolute prohibition on the discharge of pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit. JMS also effectively admits that the Eleventh Circuit departed from the express language of the CWA to carve out an exception for JMS' unpermitted discharges of polluted stormwater. Given that the absoluteness of the CWA's "zero discharge standard" has been recognized in previous decisions by this Court[1] and the Circuit Courts of Appeals,[2] the Eleventh Circuit's novel opinion in

---

[1] See EPA v. California, *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205, 96 S. Ct. 2022, 2025 (1976); see also E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 118, 97 S. Ct. 965, 970 (1977); EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 72, 101 S. Ct. 295, 301 (1980) ; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 11, 101 S. Ct. 2615, 2622 (1981) ("National Sea Clammers"); City of Milwaukee v. Illinois and Michigan, 451 U.S. 304,101 S. Ct. 1784 (1981); Weinberger v. Romero-Barcelo, 456 U.S. 305, 308, 102 S. Ct. 1798, 1801 (1982); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985); Chemical Manufacturer's Assoc. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 105 S. Ct. 1102 (1985); International Paper Co. v. Ouellette, 479 U.S. 481, 489, 107 S. Ct. 805, 810 (1987) ("Ouellette"); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 53, 108 S. Ct. 376, 379 (1987) ("Gwaltney"); U.S. Dept. of Energy v. Ohio, 503 U.S. 607, 112. S. Ct. 1627 (1992); City of Burlington v. Dague, 505 U.S. 557, 112 S. Ct. 2638 (1992); Arkansas v. Oklahoma, 503 U.S. 91, 112 S. Ct. 1046 (1992); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994).

[2] Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3241, 65 U.S.LW. 3256 (1996) (No. 95-1831); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), *reh'g denied*, 468 U.S. 1227 (1984); Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374-76 (D.C. Cir. 1977); Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127-38 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980); and Menzel v. County Utilities Corp., 712 F.2d 91, 94 (4th Cir. 1983).

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. April 1, 1996), *reh'g denied*, 89 F.3d 857 (11th Cir. June 17, 1996) ("JMS"), raises an issue of national importance worthy of review by this Court. Review is also appropriate in order to resolve the clear split of authority on this issue between the Eleventh Circuit's decision in JMS and the Fifth Circuit's decision in Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *petition for cert. filed*, 64 U.S.L.W. 3780 (U.S. May 10, 1996) (No. 95-1831). Accordingly, Petitioner respectfully requests that this Court grant his Petition for Writ of *Certiorari*.

JMS argues that the exception created by the Eleventh Circuit is justified if limited to the narrow facts of this case. In particular, JMS argues that the developer of a residential subdivision should not be subject to the zero discharge standard when a NPDES permit is not available from the issuing agency and compliance with the standard is alleged to be impossible.

Nothing in the CWA supports Respondent's argument or the Eleventh Circuit's opinion. The CWA by its express terms prohibits the discharge of *any* pollutants without an NPDES permit. The Eleventh Circuit does not have the authority - on this or any other set of facts - to create an exception to the permit requirement in cases where an issuing agency fails to make a permit available. If a prospective permittee cannot obtain an NPDES permit for its project before beginning to discharge, that project cannot go forward. Nothing in the CWA authorizes persons who fail to obtain (or fail to apply for) an NPDES permit to go ahead with the discharge of pollutants, claiming as a defense that compliance with the zero discharge

standard is impossible. Rather, the CWA absolutely prohibits the unpermitted discharge of pollutants to the Nation's waters. 33 U.S.C. § 1311.

JMS ignores the fact that it could have complied with the CWA by delaying land disturbing activities until it obtained an NPDES permit from the Georgia Environmental Protection Division ("EPD"). Once JMS chose to break ground without a permit, it took the risk that compliance with the zero discharge standard would be difficult. Even limited to the facts of this case, the Eleventh Circuit's decision is in error because it sets aside JMS' clear obligation under the statute to obtain an NPDES permit *before* engaging in activities that could result in the release of contaminants to waters of the United States. If a permit was not available, JMS ran the risk of a citizens suit if it proceeded with construction of the development.

This reading of the statute is fully consistent with longstanding interpretations of the CWA put forth by the United States Environmental Protection Agency ("EPA"), the agency responsible for developing and implementing the stormwater permitting program at the national level. The EPA has consistently adhered to a literal interpretation of the "zero discharge standard" adopted by Congress. Throughout the stormwater permitting process, the EPA has maintained that industrial entities wishing to discharge stormwater are required by the CWA to have an NPDES permit, even if such permits are not available due to administrative delays in meeting

statutory deadlines.[3] See, e.g., 50 Fed. Reg. 32548 (1985). EPA has noted that industrial dischargers unable to obtain NPDES permits for stormwater are subject to citizen suits under the CWA. See, e.g., 50 Fed. Reg. 35200, 35201-35202 (1985) (industrial dischargers of storm water remain subject to citizen suits pending promulgation of permits by EPA and authorized states). Until a permit is actually issued, "citizens remain free to initiate private enforcement actions, and to bring to the attention of permit-writing authorities any specific situation that warrants review." Id. at 35201. The EPA's construction of the Act must be accorded considerable weight and its administrative interpretations deferred to by the courts unless manifestly contrary to the intent of Congress. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

When it issued a General Permit for discharges of stormwater from construction sites, EPA unequivocally stated that "if a facility is located in an NPDES state that does not offer a general permit, then that facility must apply for an individual permit.") (R2-19-19) (emphasis supplied) (see Reply Appendix, p. RA-5). In light of this guidance from EPA, it is clear that once JMS received Mr. Hughey's sixty (60) day

---

[3] Storm water discharges have been subject to NPDES permit requirements since 1976. 50 Fed. Reg. at 32548. In a series of rule-makings published during the 1980's, the EPA established procedures and deadlines for industrial dischargers to apply for storm water permits. Congress subsequently extended the deadline for industrial dischargers to obtain a storm water permit until February 4, 1991. 33 U.S.C. § 1342 (p)(4)(A). Neither the EPA nor the Georgia EPD promulgated permits before this deadline expired. The deadline expired over a year and a half before JMS began construction of its development.

notice of intent to sue under the CWA, it should have approached the EPD for a general permit, and, upon learning that a general permit was required but not yet available, submitted an application for an individual permit covering its project.[4] JMS did not do this. In fact, it did not even attempt to qualify for a general permit until after the district court entered a temporary restraining order. Upon learning that a general permit was not available, JMS continued its unpermitted discharge of contaminants from the construction site, in amounts as high as 2,000 times the effluent limitations established in State and local law. (R3-26-3; P. Exh. 28-31 (sample results)). Contrary to the contentions of Respondent, JMS was not in substantial compliance with its development permit, and its discharges were not de minimis.

The irony of the Eleventh Circuit opinion is that it absolves from liability conduct that clearly would have been unlawful under the general NPDES permit ultimately issued by Georgia EPD. (See Respondent's Appendix, pp. 22, 57). The decision rewards JMS for setting in motion - prior to even seeking a permit - a series of discharges it later claimed to be powerless to stop. The decision likewise rewards Georgia EPD for shirking its duty to issue a permit in "a specific situation that warrants review," 50 Fed. Reg. at 35201, a situation brought to EPD's attention by Mr. Hughey before he filed suit. In so doing, the decision significantly undercuts the effectiveness of the CWA's citizen suit provision. This

---

[4] If EPD followed through on its threat not to process such applications (See Respondent's Appendix, p. 16), JMS could have brought an action against EPD to compel issuance of a permit for which it was qualified. DNR Rule 391-3-6-.15; Thurman's Auto Parts & Wrecker Service, Inc. v. Cobb County, 248 Ga. 826, 286 S.E. 707, 709 (1982).

provision is specifically designed to allow citizens like Mr. Hughey to compel compliance with the CWA when dischargers and government agencies fail to act to prevent contamination of the Nation's waters.

None of the cases cited by Respondent recognize exceptions to the CWA's absolute prohibition against discharging pollutants without a NPDES permit. Respondent is correct that certain provisions of the CWA envision the exercise of discretion. However, the statute's prohibition against the unpermitted discharges of pollutants is absolute, and the cases cited by Respondent do not hold to the contrary. Moreover, the cases principally relied upon by Respondent are inapposite because they involve discharges of pollutants by entities holding a validly issued NPDES permit: Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company, 12 F.3d 353 (2d Cir. 1993), cert. denied, __ U.S. __, 115 S.Ct. 62 (1994); Northwest Environmental Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995). Atlantic States relies on the so-called "permit shield" provision of the CWA to hold that the zero discharge standard does not apply when a facility discharges pollutants not listed in its permit, so long as the permittee is otherwise in compliance with the permit's effluent limitations. 12 F.3d at 357; see 33 U.S.C. § 1342(k). In contrast, the zero discharge standard does apply to JMS' discharges because JMS did not have an NPDES permit.

Contrary to the assertions of Respondent, this case is analogous to, and in direct conflict with, the Cedar Point Oil case decided by the Fifth Circuit. 73 F.3d at 546. In both cases the defendants undertook affirmative actions that resulted in unpermitted discharges of pollutants. (In the case at bar, it was

the affirmative act of JMS in breaking ground without a permit that resulted in violations of the zero discharge standard.) In both cases the issuing agency failed to make available a NPDES permit. Faced with these facts, the Fifth Circuit carefully reviewed the statute and the legislative history and chose to uphold the absolute prohibition against unpermitted discharges. In contrast, the Eleventh Circuit engaged in judicial activism and created an exception to the standard that runs counter to the express wording of the CWA and longstanding EPA statutory interpretations. Because the Eleventh Circuit's decision in this case directly conflicts with prior decisions of this Court and the Fifth Circuit's opinion in Cedar Point Oil, Petitioner urges this Court to grant his Petition for Writ of *Certiorari* to review the Eleventh Circuit's erroneous interpretation of the CWA, and reverse its judgment.

II. The Eleventh Circuit's Alternative Holding Should Also be Reviewed by This Court.

An injunction does not violate the specificity requirement in Rule 65 unless it is clear that the defendant could not understand its obligations under the injunction. Combs v. Ryan's Coal Co., Inc., 785 F.2d 970, 978 (11th Cir. 1986). JMS could clearly understand that it must not discharge polluted stormwater unless it obtained a permit which authorized such discharges. In any case, an injunction failing to meet Rule 65(d)'s specificity requirement should not necessarily be voided. Keyes v. School District No. 1, 895 F.2d 659, 668-69 (10th Cir. 1990) (striking only the portions of the decree that were too vague under Rule 65) and U.S. v. Holtzman, 762 F.2d 720, 766 (9th Cir. 1985) (court should not set aside an injunction unless it has no reasonably specific

meaning). This Court should review the Eleventh Circuit's alternative reason for reversing the district court, and remand the case to the Eleventh Circuit for proceedings not inconsistent with this Court's rulings.

CONCLUSION

This case presents the Court with an issue of national importance and an opportunity to resolve a clear conflict among the Circuits. Petitioner therefore urges this Court to grant the Petition for Writ of *Certiorari*. Additionally, because this case involves an issue of statutory interpretation on which the EPA has expressed clear views for over a decade, Petitioner respectfully requests that this Court seek the views of the Solicitor General.

Respectfully submitted,

Stephen E. O'Day
Counsel of Record
Mark W. Kinzer
Michelle R. Craig
Smith, Gambrell & Russell
Suite 3100, Promenade II
1230 Peachtree Street, NE
Atlanta, Georgia 30309-3592
(404/815-3500 - Telephone)
(404/815-3509 - Facsimile)

Counsel for Petitioner

APPENDIX

No. 96-420

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TERENCE D. HUGHEY,

Petitioner,

v.

JMS DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF APPENDIX

[50 Federal Register, 35200-01 (Aug. 29, 1985)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REGULATIONS; MODIFICATION OF APPLICATION DEADLINE FOR STORE WATER POINT SOURCES

Environmental Protection Agency
Final Rule

[text omitted]

IV. Summary of Comments

[The] commenters are also correct in their statement that storm water point source dischargers have required NPDES permits for some years. Although some dischargers have already applied for and received permits for storm water discharges, the vast majority of such dischargers have not applied for permits. However, there has been some uncertainty in recent years concerning permit application requirements, particularly in those States in which EPA administers the NPDES program... Postponement of the [application] deadline clearly would not preclude requiring a permit application or issuance of a permit in the interim on a case-by-case basis as appropriate if a problem is identified. Finally, citizens remain free to initiate private enforcement actions, and to bring to the attention of permit writing authorities any specific situation that warrants review.

[text omitted]

It should be re-emphasized that these deadline extensions do not relieve point source dischargers from the requirement to

obtain NPDES permits. EPA regional offices have been directed to respond to inquiries and petitions concerning specific storm water discharges which may pose problems. The extension does not preclude issuance of permits where a problem is identified, nor does it affect citizens rights under section 505 of the Act. States authorized to administer the NPDES program remain free to require permit applications at earlier dates.

[50 Federal Register, 32548-01 (Aug. 12, 1985)]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT REGULATIONS; STORM WATER POINT SOURCES

Environmental Protection Agency
Proposed Rule; Reopening of Comment Period

[text omitted]

I. Background

[text omitted]

The application deadline does not eliminate the requirement for a point source to have a permit, nor does it provide protection from enforcement actions by citizen groups or NPDES states.

[S]torm water discharges have been subject to NPDES permit requirements since 1976...

[U.S. EPA Letterhead]

Environmental News

EPA RELEASES FINAL STORM WATER DISCHARGE GENERAL PERMIT

Thursday, September 3, 1992
Sean McElheny 202-260-1387

As of today, industrial facilities have two application options. They must apply for either a general or individual permit by Oct. 1, 1992. If a facility is located in a NPDES state that does not offer a general permit, then that facility must apply for an individual permit. EPA urges facilities to apply for a general permit to avoid the more expensive and complex individual permit. Applications for coverage under today's permits should be sent to EPA's NOI Processing Center; Storm Water Notice of Intent, P.O. Box 1215, Newington, Va. 22122.